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Supreme Court, U.S.
FILED

08-246 AUG 25 2008

OFFICE OF THE CLERK

No. ———

In the Supreme Court of the United States

MICHIGAN ENVIRONMENTAL COUNCIL,
Petitioner,

v.

MICHIGAN PUBLIC SERVICE COMMISSION AND INDIANA MICHIGAN POWER COMPANY,
Respondents.

On Petition for Writ of Certiorari to the Michigan Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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August 25, 2008

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QUESTION PRESENTED

Indiana Michigan Power Company ("IMP") provides retail electric service in Michigan subject to the ratemaking jurisdiction of the Michigan Public Service Commission ("MPSC"). IMP is a party to a "Standard Contract" with the Department of Energy ("DOE") for the disposal of spent nuclear fuel ("SNF"). The Standard Contract resulted from enactment of the Nuclear Waste Policy Act of 1982 ("NWPA"). Both the NWPA and the Standard Contract required the utility to pay SNF fees to the DOE in exchange for DOE's unconditional obligation to dispose of SNF beginning January 31, 1998. *Indiana Michigan Power Company v. Department of Energy*, 88 F.3d 1272 (C.A. D.C., 1996). ("*Indiana Michigan*"); *Northern States Power Company et al v. DOE*, 128 F.3d 54 (1997) ("*Northern States*") The DOE has not begun SNF disposal and is in default of the Standard Contract.

In September 2003, IMP filed a rate case with the MPSC seeking approval of its Power Supply Cost Recovery ("PSCR") rate factors for the year 2004. IMP included its SNF fee costs under the Standard Contract in its PSCR rate request. The MPSC and Michigan Court of Appeals concluded that IMP's continued SNF fee payments under the Standard Contract must be deemed reasonable and prudent for inclusion in IMP's retail rates, and without protective conditions, because the fees "are mandated by federal law," despite the federal contract default.

Against this background, the question presented is:

1. Whether federal law preempts the Michigan Public Service Commission from exercising its historic police powers to protect the public interest and to regulate electric utility retail rates by adopting ratemaking remedies with respect to a utility's continued payment of SNF fees under the Standard Contract that is in long-term default?

PARTIES TO THE PROCEEDINGS

The following were the parties to the proceedings before the Michigan Court of Appeals:

1. Michigan Environmental Council ("MEC")

2. Public Interest Research Group in Michigan ("PIRGIM")

3. Michigan Public Service Commission ("MPSC")

4. Indiana Michigan Power Company ("IMP") which is a subsidiary of American Electric Power Company.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner MEC states that it has no parent corporations, no publicly held companies owning 10% or more of its stock, and no non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

The Michigan Environmental Council ("MEC") respectfully petitions the Court for a writ of certiorari to review the judgment of the Michigan Court of Appeals in this case.

OPINIONS BELOW

The Michigan Court of Appeals' Opinion (Petitioner's Appendix, 1a-16a) is reported at 738 N.W.2d 289 (2007). The MPSC opinion and order in Case No. U-13919, dated April 28, 2005 is attached (25a-43a). The MPSC's August 1, 2005, order denying Petitioners' Motion for Rehearing is attached (17a-24a).[1]

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The question presented involves the following constitutional and statutory (and federal contract) provisions:

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[1] The Michigan Court of Appeals' June 7, 2007 order denying Petitioner's Motion for Reconsideration (71a-72a); the Michigan Supreme Court's January 22, 2008 order denying Petitioner's Application for Leave to Appeal (69a-70a); and the Michigan Supreme Court's May 27, 2008 order denying Petitioner's Motion for Reconsideration and Motion for Stay (67a-68a) are attached.

The Supremacy Clause of the United States Constitution, Article VI, clause 2 provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

The Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. § 10101 *et seq.* ("NWPA"), relevant provisions (73a-97a), and the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste ("Standard Contract"), 10 C.F.R. § 961.11 *et seq.* (98a-138a).

Michigan's ratemaking statutes include Sections 6 and 6a of 1939 P.A. 3, M.C.L. 460.6 and 6a, as amended by 1982 P.A. 304, M.C.L. 460.6j *et seq.*, including Sections 6j, 6k, 6l, 6m, M.C.L. 460.6j-6m, ("Act 304") (139a-174a), procedural provisions of the Michigan Administrative Procedures Act, 1969 P.A. 306 ("APA"), including Sections 1, 3, 71-87, M.C.L. 24.201, 203, 271-287, (175a-190a).

STATEMENT

This case is the latest chapter in a long odyssey, comprising nearly a decade, in which Petitioner has sought protective ratemaking remedies on behalf of Michigan ratepayers before the MPSC and Michigan Courts to address the ongoing inclusion by nuclear utilities of SNF fees paid under the Standard Contract which is in long-term default. This is the first final

decision of the Michigan Courts on this issue that is reviewable in this Court.

Petitioner has consistently presented substantial expert evidence and briefing before the MPSC and Courts demonstrating that nuclear utilities serving Michigan have failed to carry their burden to establish that they have been reasonable and prudent in continuing to pay the SNF contract fees in the face of DOE's indefinite and continuing default.

In contrast, the utilities, including IMP, have relied upon an argument of federal preemption – that continued payment of the SNF contract fees is reasonable and prudent because the fee payments are "mandated by federal law".[2]

The MPSC and lower Court decisions, through an improper application of preemption and misunderstanding of federal precedent, have deprived ratepayers of administrative ratemaking remedies respecting costs incurred under the breached federal contract, and have dangerously circumscribed the MPSC's regulatory jurisdiction and authority to set just and reasonable rates and protect Michigan's retail ratepayers. Left undisturbed, the decisions below effectively undermine the ability of any state

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[2] Another contemporaneous MPSC case and Michigan Court of Appeals decision that has adopted this federal law preemption result, but by improperly applying "collateral estoppel" to the issue, based upon this case, is pending a decision on Petitioner's August 15, 2007 application for leave to appeal in the Michigan Supreme Court (see *In re Application of Detroit Edison*, 740 N.W.2d 685 (2007), ("*DECo*") (234a-280a, and specifically 267a).

commission to exercise its regulatory authority respecting the purely economic aspects of the costs of nuclear energy production and of spent nuclear fuel costs. The decisions below ignore and conflict with this Court's ruling in *Pacific Gas and Electric Co. v. Energy Resource Commission*, 461 U.S. 190 (1983), and ignore or misconstrue other federal precedent including *Indiana Michigan Power Company et al. v. Department of Energy*, 88 F.3d 1272 (D.C. Cir. 1996), ("*Indiana Michigan*"); *Northern States Power Company et al v. DOE*, 128 F.3d 54 (1997), ("*Northern States*") among other cases. As such, the decisions present recurring questions of national importance that require resolution by this Court.

The MPSC and lower Court decision also ignored long-standing precedent in Michigan that: (i) the MPSC possesses the authority and duty to protect ratepayers from an uneconomic or failed contract entered into by a utility by using its ratemaking power to disallow costs of the contract in rates (not by directing utility decision making); *Union Carbide v. Public Service Commission*, 428 N.W.2d 322 (1988), and (ii) the costs incurred by a utility pursuant to a federal statutory mandate does not necessarily govern the MPSC ratemaking determination concerning whether the costs should be includable in rates; *City of Detroit v. PSC*, 14 N.W.2d 784 (1944).

1. The Department of Energy's default under the Standard Contract.

Congress adopted the NWPA in 1982 to address the disposal of SNF (73a-97a). The NWPA was preceded by decades of promises by the federal government that

it would undertake responsibility to dispose of SNF, dating from the time of the Manhattan project and the 1950's "Atoms for Peace" program aimed at promoting the commercial generation of nuclear energy.

The NWPA included no provision indicating Congressional intent to affect, let alone preempt, state ratemaking authority over utilities providing retail electric service. The "Findings" and "Purposes" section of the NWPA, Section 111(a) and (b), 42 U.S.C. § 10131 (82a-85a) states that the costs of SNF disposal "should be the responsibility of the generators and owners of . . . spent fuel" and that one of the purposes of the NWPA is:

> " (4) to establish a Nuclear Waste Fund, composed of payments made by the generators and owners of such waste and spent fuel, that will ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel."

Under Section 302(a)(1) and (2), 42 U.S.C. § 10222(a)(1) and (2), the DOE Secretary is to enter into contracts "with any person who generates or holds title to . . . spent nuclear fuel. . ." and for ". . . disposal of . . . spent fuel", and further, that the contracts should provide for the "payment to the Secretary of fees" for "electricity generated . . . and sold . . . equal to 1.0 mil per kilowatt hour" (85a). Section 302(a)(5), 42 U.S.C. § 10222(a)(5) (87a), provides:

> "...(5) Contracts entered into under this section shall provide that—
>
> ...(B) in return for payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subtitle."

In 1983, the DOE promulgated its uniform "Standard Contract" to carry out the NWPA (98a-138a). The Standard Contract (Art II – Scope) stated (111a):

> ". . . .The services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all SNF and/or HLW from the civilian nuclear power reactor . . . has been disposed of."

The Standard Contract (Article XI – Remedies) also preserved all contractual and legal remedies to enforce the Contract. ("Nothing in this contract shall be construed to preclude either party from asserting its rights and remedies under the contract or at law"). (129a).

Despite the statutory and contractual deadline for commencement of SNF disposal, the DOE on April 28, 1995, issued its *Final Interpretation of Nuclear Waste Acceptance Issues*, 60 Fed. Reg. 21,793 (1995), absolving itself of any duty to dispose of SNF until it had access to a federal repository. In response, many utilities, states, and state utility regulatory agencies,

appealed to the United States Court of Appeals (D.C. Circuit), which reversed and vacated DOE's "Final Interpretation" in *Indiana Michigan*. The Court held that there was a reciprocal obligation between payment of the SNF fee and DOE's performance of its SNF disposal duties:

> ". . . we hold that section 302(a)(5)(B) creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998."

Upon remand, the DOE did nothing to comply with the Court's directive. Because the 1998 deadline was fast approaching, the utility and state petitioners filed another case in the United States Court of Appeals seeking mandamus to require the DOE to comply with *Indiana Michigan*. In response, the Court issued its decision adopting a partial mandamus order in *Northern States* (128 F.3d at 761) reiterating its findings in *Indiana Michigan* . . . "that the NWPA imposes an unconditional obligation on the Department to begin disposal of the SNF by January 31, 1998.". The *Northern States* Court found that a full mandamus was not yet called for on the basis that damage suits against DOE in the United States Court of Claims may provide a "potentially adequate remedy". The *Northern States* Court did not foreclose other potential remedies that may be pursued later.

After *Northern States*, some nuclear utilities – including IMP – filed damage actions against DOE in the Court of Claims. However, while the Court of Claims can award damages for certain costs incurred by utilities arising from DOE's contract default, such

awards neither result in SNF disposal nor performance under the Standard Contract, nor do they protect the SNF fees that continue to be paid. Further, while a utility's claimed damages represent costs generally paid by ratepayers in rates, the Court of Claims has no power to ensure that ratepayers receive refunds from damage awards.

In 1983, IMP entered into the Standard Contract with the DOE for disposal of the SNF generated by IMP. IMP continues to pay the SNF fee, without any discernable protections or conditions, despite the more than ten-year default by DOE under the Standard Contract.

2. State retail ratemaking authority over SNF fee cost/rate issues.

The MPSC is granted the jurisdiction, authority, and duty to set retail rates for utilities pursuant to several statutes, including 1939 P.A. 3 ("Act 3") and Act 304, (139a-174a) among others. IMP is a nuclear utility serving retail electric customers in the State of Michigan.

General rate cases and Act 304 cases are classified as "contested cases", subject to prior notice and hearing, under both the above MPSC statutes and the Michigan Administrative Procedures Act, 1969 P.A. 306, MCL 24.201 *et seq.* (175a-190a). The APA provides parties to agency proceedings extensive rights to formal discovery, presentation of witnesses, cross-examination, written briefs, issuance of a Proposal For Decision ("PFD") by the Administrative Law Judge (ALJ), the right to file written exceptions thereto, and

an agency made "upon consideration of the record as a whole . . . and as supported by and in accordance with the competent, material, and substantial evidence". Art 6, Section 28, of Michigan's Constitution (191a) also places this latter requirement upon public agencies such as the MPSC.

Act 304 was adopted in 1982 to provide greatly enhanced scrutiny of utility fuel, purchased power, and related costs, on an annual basis. For electric utilities, these are called "power supply cost recovery" ("PSCR") cases.

Section 6a, M.C.L. 460.6a, (141a-144a), requires full evidentiary hearings in Act 304 and general rate cases. Section 6a requires a utility to "place in evidence facts relied upon to . . . increase its rates and charges" and "a reasonable opportunity for a full and complete hearing".

Section 6a provides that the MPSC

> "shall authorize a utility to recover the cost of fuel, purchased gas, or purchased power only to the extent that the purchases are reasonable and prudent."

Section 6j(1)(a) and (b), M.C.L. 460.6j(1)(a) and (b), of Act 304 (144a-145a), provides for PSCR clauses and rate factors:

> ". . . to allow the utility to recover costs . . . incurred under reasonable and prudent policies and practices."

Section 6j(3) states that "a utility annually shall file . . . a complete" PSCR plan describing the expected sources and changes in the cost of electric power supply, all major contracts and power supply arrangements to include the price of fuel, duration of the contract or arrangement, and related information "as required by the Commission, and "an explanation of the actions taken by the utility to minimize the cost of fuel to the utility." (145a-146a). Section 6j(6), requires the MPSC to evaluate the reasonableness and prudence of the decisions underlying the utility's PSCR plan, and to "approve, disapprove, or amend" the plan, and to consider . . . whether the utility has taken all appropriate actions to minimize the cost of fuel". (147a-148a).

Act 304's review process includes specifically nuclear fuel costs, including costs for SNF disposal. Section 6j(1)(a) refers to "transportation costs, reclamation costs, and **disposal and reprocessing costs, of fuel burned by the utility for electric generation**." (144a). Section 6j(13)(g) and (j) mandates that the MPSC in a PSCR reconciliation shall "disallow additional costs resulting from unreasonably or imprudently renegotiated fuel contracts" and to "disallow increases in charges for **nuclear fuel disposal** unless the utility has received the prior approval of the commission". (151a, 153a).

The Commission's jurisdiction to fully review SNF fee costs is clear under the plain language and purpose of Act 304.

3. IMP case before the MPSC and Michigan Court of Appeals.

On September 30, 2003, IMP filed this PSCR rate case for the calendar year 2004. IMP included in its PSCR costs for rate purposes the SNF fee paid under the Standard Contract for nuclear energy generated and sold. However, IMP's application and prefiled testimony did not explain or justify the inclusion in rates of the SNF fee.

Petitioner MEC[3] (jointly with PIRGIM) intervened, and sought extensive discovery from IMP to determine IMP's actions or non-actions in enforcing the Standard Contract, to protect the SNF fees, or to obtain SNF disposal. Petitioner's discovery sought to fully explore how IMP could claim that it was reasonable and prudent in continuing to pay the fees, without protective conditions, and to seek rate recovery in this case for the fees, in light of the long-term federal default under the Standard Contract. IMP objected to the discovery, and refused to answer, whereupon Petition filed a motion to compel, which the ALJ denied. Petitioners also prefiled the testimony and exhibits of its witness, Ronald C. Callen, an expert in nuclear energy, SNF disposal, and state and federal

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[3] MEC is a statewide environmental and consumer protection organization comprising over 70 public interest organizations representing some 200,000 Michigan utility ratepayers.

utility regulation.[4] IMP prefiled the testimony of its rebuttal witness, Douglas H. Malin.

Prior to the hearings, IMP filed a motion (and brief) to strike Petitioner's expert testimony and exhibits asserting that: (i) Petitioner's remedies were "beyond the scope of this proceeding" because the SNF fees mandated by 42 U.S.C. § 10222(2) and the Standard Contract were "legally unavoidable" such that "its recovery may not lawfully be precluded,"; (ii) that IMP had a "statutory and constitutional right" to "full cost recovery", and that any rate disallowance is "preempted" as a "conflict with the NWPA and congressional intent that the waste disposal fees should be born by customers/users of the power"; and (iii) that, "because the SNF fees are compulsory, there cannot be any reasonable argument that AEP is acting unreasonably or imprudently in paying the fee or requesting its collection from customers through the PSCR factor."

Petitioners filed a response to IMP's motion to strike taking exception to IMP's theory that SNF fee payments, without protective conditions, remain "mandated" by federal law (NWPA and Standard Contract) given the long-term contract default, and in view of the federal court rulings in *Indiana Michigan* and *Northern States* holding that the payment of fees

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[4] Mr. Callen has 15 years experience as a physicist in the nuclear industry followed by 25 years on the staff of the MPSC, two years as the first director of NARUC's (National Association of Regulatory Utility Commissioners) nuclear waste office in Washington, DC and eight (8) years as a consultant and witness in cases involving nuclear power and SNF matters.

was reciprocal to performance under the contract by 1998, and further, that even if the company should choose to pay the fees, the MPSC under its independent ratemaking authority may refuse to recognize the fees in rates, or adopt protective terms and conditions. Petitioners' response also asserted:

> ". . . IM Power should be required to establish some basis for the recovery of SNF fees in this case. IM Power had provided no information to establish that it is fully enforcing its contract with DOE or that it is seeking full remedies to protect the amount of fees being paid, in view of the federal default in 1998.

At the start of the agency hearings, the ALJ granted IMP's motion to strike Petitioner witness' testimony in part. Petitioner's witness Callen then presented the remaining unstricken portion of his testimony, which contained substantial evidence in opposition to including IMP's NSF fee payments in rates.

Mr. Callen recommended that the MPSC disallow IMP's SNF fee costs because of "the total lack of support or explanation for the inclusion of SNF fee [ ] costs in this case," and because:

> ". . . IM Power has not been reasonable and prudent with respect to the incurrence of these costs, and has failed to undertake necessary or sufficient action to mitigate or minimize these costs, or to seek protection of the amounts represented by said costs."

Petitioner's expert Callen detailed the substantial costs and risks placed on ratepayers from the federal contract default, and described the inadequacy of IMP's plan and forecast:

> "While IM Power has included in this plan and forecast [the SNF fee costs] IM Power's testimony and exhibits are devoid of any explanation concerning its handling of SNF issues and costs. Thus, there is no support for any finding that IM Power has been reasonable and prudent with respect to said matters . . . Since IM Power has failed to do so, the Commission should reject IM Power's PSCR plan and forecast."

The ALJ denied Petitioner's motion to strike IMP's rebuttal testimony, filed by IMP witness Malin, concerning SNF fee cost/rate issues. Over Petitioner's vigorous objection that witness Malin's testimony comprised scant legal conclusions by a non-lawyer, IMP witness Malin testified that IMP "had no practical alternatives other than to sign standard contracts with the DOE in order to obtain and maintain operating licenses", that any fee "nonpayment would result in interest charges and possible contract suspensions", and that "I&M is obligated to make payments to the DOE for . . . SNF fees or run the risk of severe consequences".

In post-hearing briefing, Petitioners continued to assert that the MPSC had the authority and duty to address the SNF fees issues and to protect ratepayers by a rate disallowance or by placing SNF fee collections from ratepayers in an escrow trust, among

other remedies. IMP again asserted preemption (i.e. that the MPSC was essentially powerless to do anything but to simply flow-through, without any protective conditions, the SNF fees in PSCR rates, because "the fees were federally mandated" and because non-payment would risk adverse actions to its nuclear plant license).

The ALJ's June 4, 2004 PFD (44a-66a) rejected Petitioners' evidence and briefing recommending a rate disallowance or an order requiring IMP to refile its case to establish the reasonableness and prudence of its SNF fee costs. (53a-58a). The ALJ (57a) ruled that "it remains reasonable and prudent for IMP's customers to continue paying into the Nuclear Waste Fund"[5] and that "[F]ailure to do so (by unilaterally escrowing those payments, as advocated by the MEC)[6] could result in the imposition of interest charges, lead to revocation of the utility's license to operate the Cook

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[5] The NWPA and Standard Contract provide for the "generators and owners" of SNF to pay into the Nuclear Waste Fund; the MPSC decides what shall be recovered in retail rates.

[6] Petitioner never argued that IMP should simply "unilaterally cease its payments of SNF fees"; instead, Petitioner asserted throughout, in accordance with Michigan judicial precedent (e.g. *Union Carbide, supra*), that the MPSC possessed the jurisdiction and duty to protect ratepayers through its ratemaking powers, and that it remained for utility management to determine its own course of action – such as continuing to pay the fees, or to seek relief before a court (or DOE itself) to protect its fee payments pending DOE's resolution of its contract default.

Nuclear Plant, and render I&M ineligible for someday using the DOE's permanent storage facility."[7]

On June 18, 2004, Petitioners filed exceptions to the PFD asserting that IMP was not reasonable and prudent in continuing to make SNF fee payments under a contract in long-term default, without any protective conditions or adequate enforcement of the contract, and particularly in light of the reciprocal obligations between the payment of the fee and commencement by DOE of SNF disposal by January 31, 1998. *Indiana Michigan, supra.* Petitioners asserted that the ongoing fees payments remain unprotected, and that IM Power's strategy of simply paying the fees indefinitely (without protective terms or conditions), despite indefinite non-performance under the contract, was not reasonable or prudent.

The MPSC's April 28, 2005 Opinion and Order (25a-43a) adopted IMP's position "that IM has not acted unreasonably or imprudently in its handling of SNF payments" and . . . that "nothing persuades the Commission that I&M should unilaterally cease its payment of SNF fees to the DOE at this time"[8] and "[T]o do so might risk . . . interest payments . . . suspension of the standard contract . . . and . . . non-

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[7] The PFD failed to explain how these "retaliatory actions" could be undertaken, or to recognize that IMP could seek to undertake various actions, including court actions under Article XI (Remedies) of the Standard Contract, to seek an escrow of the fees, with protections from retaliatory actions.

[8] See FN 6, Id.

renewal of I&M's nuclear plant license."[9] The order suggested that actions and risks "must be more fully examined, preferably in a generic proceeding . . ." (37a-38a).[10]

On August 1, 2005, the MPSC issued its order denying Petitioners' motion for rehearing (17a-24a), adopting IMP's position that the utility is "legally obligated to pay the SNF fees, in order to retain its nuclear plant license" and that "escrowing of the funds is disallowed under the standard contract."[11] (20a-21a).

Petitioners appealed the MPSC orders to the Michigan Court of Appeals reiterating the MPSC's authority and duty under Act 304 to protect ratepayers with respect to the SNF fees included in PSCR rates for a contract in long-term default, and making clear that the MPSC was not preempted from adopting ratemaking remedies relating to the SNF fees. Once again, the utility advanced its preemption argument: that the MPSC properly regarded IMP's continued payment of SNF fees as reasonable and prudent because payment was "mandated by federal law" and because non-payment would risk adverse action with its nuclear plant license.

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[9] See FN 7, Id.

[10] This suggestion rings hollow as the MPSC subsequently then dismissed Petitioner's generic complaint in MPSC Case U-13771 on these issues (see *infra*).

[11] The source of this MPSC legal finding is unknown.

On April 24, 2004, the Michigan Court of Appeals affirmed the Commission orders (1a-16a). The Court (6a and 9a) adopted the unexplained legal claims of IMP's non-lawyer witness as a basis for its decision (thereby confusing what should be a de novo court finding of law as being dependent upon a witness's opinion).

The Court (12a) ignored and eviscerated the federal court holding in *Indiana Michigan*:

> "*Indiana Michigan Power Co*, does not hold that a utility's payment of SNF disposal fees is contingent on the DOE's putting into operation a disposal facility no later than January 31, 1998. The payment of SNF fees by a utility is mandated by 42 USC 10222."

The Court's (11a-13a) "federal mandate" and "nuclear license" conclusions (handed down to the Court by IMP's non-lawyer witness) thus became the basis for the Court (and MPSC) being unable to find that IMP was "unreasonable or imprudent" (13a). In other words, because of the preemption ("federal mandate") no unreasonableness or imprudence could be found. So long as the "federal mandate" of payment of SNF fees is accepted as an unchangeable given, there can be no case in which the utility's payment of same would ever be unreasonable or imprudent.

In contradictory fashion, the lower Court then stated it was not ruling upon preemption:

> "Appellants argue that federal law does not preempt the PSC's ratemaking powers over

> SNF fees. We need not consider this argument because the PSC did not rely on the doctrine of federal preemption." (fn5, 13a).

The lower Court fails to explain how it could avoid review of the statutory and constitutional preemption issues presented to it on the basis of the MPSC orders when Michigan precedent holds that agencies such as the MPSC are not to decide constitutional issues, and the Courts are to review and decide statutory and constitutional questions on a de novo basis. *Universal Am-Can v. MPSC*, 494 N.W.2d 787 (1992); *City of Taylor v. The Detroit Edison Co.*, 715 N.W.2d 28 (2006).

The lower Court then returns to its preemption holding, by citing the federal statutory "mandate" and by relying on a case that dealt with the "federal filed rate doctrine":

> "Moreover, a state utility commission must allow, as a reasonable operating expense, a copy incurred pursuant to a federal statute, *ABATE v Public Service Comm*, 192 Mich App 19, 22-27; 480 NW2d 585 (1991) (holding that states must give effect to rates approved by the Federal Energy Regulatory Commission), and SNF fees paid by IMPCo are mandated by statute, 42 USC 10222(a)(2)." (fn 5, 13a).

The lower Court decided the preemption issue by adopting without scrutiny the utility's arguments (and the MPSC's conclusion) that SNF fee payments were mandated by federal law and that the utility's non

payment would risk adverse action on the company's nuclear plant license. (11a-13a)

4. The DECo case before the MPSC and Courts.

In 2003, several months before IMP's MPSC filing in this case, another Michigan utility, the Detroit Edison Company ("DECo"), filed a consolidated general rate case and Act 304 PSCR case. DECo's case proposed the continued inclusion in rates of its SNF fee costs under its Standard Contract.

MEC/PIRGIM intervened in the *DECo* case and challenged through expert testimony DECo's proposal to flow-through in rates the cost of the SNF fees (without protective conditions), in view of the federal default of the Standard Contract.

In post hearing briefing, Petitioners extensively briefed the legal authority showing that the MPSC was not preempted by federal law from invoking ratemaking remedies with respect to the SNF fee costs. In contrast, DECo argued that the MPSC was preempted from adopting ratemaking remedies respecting the SNF fee costs on the basis that the fees were "mandated by federal law".

The ALJ in *DECo* ruled in his PFD that MPSC ratemaking authority over the SNF fees was preempted (303a-308a). Petitioners filed exceptions to this ruling.

Despite the extensive evidence presented by Petitioner concerning the SNF fee cost/rate issue, and

the extensive briefing by Petitioners and DECo concerning the preemption issue, the MPSC's final order, in only four sentences, avoided making any substantive findings whatsoever, except to adopt the ALJ's preemption ruling (297a).

Upon appeal of the MPSC order in *DECo* to the Michigan Court of Appeals, Petitioner and DECo extensively briefed the SNF fee and preemption issues. The Court issued its July 3, 2007 decision *In re Application of Detroit Edison*, 740 N.W.2d 685 (2007) (267a) entirely side-stepping the preemption issue:

> "We note at the outset of our analysis of MEC's and PIRGIM's appeal that these same plaintiffs challenged the PSC's identical determination regarding spent nuclear fuel (SNF) issues in *In re Application of Indiana Michigan Power Co*, 275 Mich App 369; 738 NW2d 289 (2007). In *Indiana*, we rejected each and every legal challenge MEC and PIRGIM raise here. Therefore, for the reasons and on the grounds set forth in our decision in *Indiana* and under the doctrine of collateral estoppel, we reject all of plaintiff's arguments regarding the SNF-related issues and hold that the PSC properly rejected all of MEC/PIRGIM's SNF-related challenges."

The same judge authored the lower Court's decision in this case and the *DECo* case.[12] The *DECo* Court's *sua sponte* application of collateral estoppel to dispose of the SNF fee/preemption issues contravened established Michigan precedent that collateral estoppel does not apply to MPSC ratemaking cases. *Consumers Energy v. MPSC*, 707 N.W.2d 633 (2005). While the preemption issue was fully litigated before the MPSC (and the PSC adopted the ALJ's PFD finding in favor of preemption), the Court also nevertheless abdicated its duty to undertake de novo court review of the constitutional issue. *Universal Am-Can v. MPSC, supra*. The *DECo* Court's application of collateral estoppel in this fashion also disregarded the procedures set forth in the Michigan Court Rules, M.C.R. 7.215(J) (192a-195a) for departing from established binding precedent. In contradictory fashion, the Court in *IM Power* (this case) also stated it did not rule on preemption because the MPSC did not, while the Court avoided ruling on preemption in *DECo*, where the MPSC adopted the ALJ's finding in favor of preemption.

5. MPSC and Court cases involving CECo.

Petitioners also intervened in the 2004 PSCR case filed by another Michigan nuclear utility, Consumers Energy Company ("CECo"). Petitioner in evidence and briefing challenged CECo's inclusion in rates of CECo's

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[12] Petitioner's August 15, 2007 application for leave to appeal the *DECo* decision remains pending before the Michigan Supreme Court.

SNF contract fees, based upon similar grounds as presented in *IM Power* and *DECo*.

Petitioner appealed the MPSC order denying relief in CECo. Upon review, the Michigan Court of Appeals issued its April 1, 2008 unpublished decision (309a-347a) affirming the MPSC order based upon the Court's decisions in *IM Power* and *DECo* (345a-347a). Petitioner's subsequent application for leave to appeal to the Michigan Supreme Court is pending.

6. Generic Complaint regarding SNF cost/rate issues.

On March 26, 2003, Petitioner MEC (and other joint parties) filed a comprehensive generic Complaint in MPSC Case No. U-13771, naming as Respondents the five nuclear utilities then serving Michigan ratepayers, concerning SNF fee cost/rate issues and requesting the MPSC to impose several remedies to protect ratepayers. (374a-459a).

The five respondent utilities, including IMP, DECo, CECo, and two Wisconsin utilities, filed motions and briefs seeking dismissal of the Complaint on several grounds, including preemption. Following responsive briefs by Complainants, and hearings on the motions, the presiding ALJ issued her PFD (460a-571a) ruling that: (1) Petitioners had standing to bring the complaint (483a-512a); (2) the MPSC possessed the subject matter jurisdiction to consider the issues and remedies raised in the Complaint, and that MPSC authority is <u>not</u> preempted by federal law (512a-533a); and (3) that the Commission possessed jurisdiction under state law to grant the various remedies

requested in the Complaint (533a-560a). The PFD, however, recommended dismissal of the generic complaint without prejudice to a refiling of separate complaints against one or more of the respondents (570a-571a).

Upon the filing of exceptions and replies by all parties, the MPSC's September 20, 2005 order (572a-594a) adopted the ALJ's recommendation that the complaint be dismissed "without prejudice to refiling the complaint" (590a-592a). This result remained unchanged under the Commission's February 9, 2006 order denying complaint's motion for rehearing (595a-602a).[13]

7. The Wisconsin utility cases.

In 2000, Wisconsin Public Service Corporation (in MPSC Case No. U-12613) and Wisconsin Electric Power Company (in MPSC Case No. U-12615) filed Act 304 PSCR cases for the year 2001. In 2000, Wisconsin Electric also filed (in MPSC Case No. 12725) a general rate case.

Petitioner MEC (and PIRGIM) intervened in these cases and presented expert testimony and filed briefs urging the MPSC to investigate SNF cost/rate issues and to consider potential actions concerning same (but did not advocate a rate disallowance of SNF fee costs in rates).

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[13] By this time, however, Petitioner was engaged in the cases (discussed in subsection 3, 4, and 5 above) on the SNF cost/rate issues.

Upon appellate review in these cases, the Michigan Court of Appeals issued unpublished decisions affirming the MPSC decisions, (348a-357a and 358a-373a). These decisions were non-binding under the Michigan Court Rules (M.C.R. 7.215(C), 192a).

In one of these unpublished decisions, the Court (357a) stated:

> "The issues raised by plaintiffs are appropriate for consideration, but not in a power supply cost recovery plan case."

The Court never explained how the SNF cost/rate issues were not appropriate in a PSCR case when the utilities sought recovery for all of their SNF fee costs in the PSCR cases, and the PSCR statute (Act 304) expressly provides for scrutiny of nuclear fuel disposal costs, and provides remedies of rate review and disallowance.

The Court's unexplained finding was prescient in one aspect, however. As the course of litigation before the MPSC and Michigan Courts have transpired, there is no forum for ratepayers to seek meaningful review or rate remedies regarding the SNF fee cost/issues – in either a PSCR case (as here in *IM Power* or in *CECo, supra*), or in a general rate case (*DECo, supra*), or by a generic complaint case (U-13771). The reason for this absence of meaningful review is the agency's misguided belief that the efforts on behalf of ratepayers is futile on the basis the state regulatory commission is <u>preempted</u> from any action other than simply passing-through in retail rates a utility's SNF fee payments under the breached contract.

REASONS FOR GRANTING THE WRIT

The lower Court improperly affirmed the MPSC's circumscribed view of its own ratemaking authority respecting the economic regulation of nuclear power in a decision based on mistaken interpretations of federal statutes and decisions (*Indiana Michigan*, *Northern Power*, and *Pacific Gas and Electric, supra).*

The erroneous decision has far-reaching consequences: it impacts millions of citizens and billions of dollars of ratepayer derived funds; it has already been applied to other Michigan cases – the *DECo* and *CECo* case described above, and may infect regulatory commission and Court decisions in other states by undermining the explicit holding by federal courts that the SNF fee payments are reciprocal to DOE's obligation to dispose SNF.

This Court's review would resolve the confusion and uncertainty created by the decisions below with respect to state regulatory authority over the economic aspects of nuclear power.

1. The MPSC and Michigan Court of Appeals' decisions are contrary to decisions of this Court, the federal Court of Appeals, and lower federal courts.

The MPSC and Court decision below erroneously found that federal preemption of state ratemaking authority applies in this case. The decisions below do so by ignoring this Court's decision in *Pacific Gas & Electric v. Energy Resource Commission*, 461 U.S. 190 (1983), by misconstruing the U.S. Court of Appeals'

holdings in *Indiana Michigan* and *Northern States Power*, by misapplying the NWPA and Standard Contract, and by ignoring this Court's standards for determining federal preemption.

This Court in *Pacific Gas* held that state regulation with respect to the economic aspects of nuclear power, or to address the **economic** or **environmental** effects of nuclear generation and nuclear waste, are not preempted by federal law, including the NWPA and the Atomic Energy Act establishing NRC regulation. Thus, federal law does not foreclose state remedial or protective actions to protect ratepayers.

No dispute existed here that the SNF fee cost issues were squarely placed before the MPSC as a matter of state (not federal) retail electric regulation. Thus, the MPSC had the primary regulatory jurisdiction under state statutes to review this issue, in a manner fully consistent with Congress' demarcation in the regulation of utilities between the federal and state governments.[14]

The lower Court also misconstrued the NWPA. The fee mandate in 42 U.S.C. § 10222 is tied to the requirement in 42 U.S.C. § 10222 that the DOE Secretary enter into the Standard Contract. In other words, the statutory fee is required by the NWPA to be

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[14] Congress in Section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b), expressly preserved state ratemaking and other regulation over retail electric sales. *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515 (1945); *New York v. Federal Energy Regulatory Comm'n*, 535 U.S. 1 (2002); *Detroit Edison v. FERC*, 334 F.3d 48 (2003).

included in the contract, and is then tied to the reciprocal obligation of payment of fees in exchange for commencement of SNF disposal by January 31, 1998 (42 U.S.C. § 10222(a)(5); *Indiana Michigan Power*). The statutory fee "mandate" is not a stand-alone requirement, but must be interpreted within the overall contractual context established in 42 U.S.C. § 10222.

Several federal courts have held that the DOE's obligation to dispose of spent nuclear fuel is only contractual. *Yankee Atomic Electric Co. v. United States*, 42 Fed. Cl. 223 (1998); *Consumers Energy Co. v. United States*, 57 Fed. Cl. 278 (2003); *Commonwealth Edison Co. v. United States*, 56 Fed. Cl. 652 (2003). If the NWPA obligated the utilities to enter into the contracts (and to pay the fee in exchange for commencement of SNF disposal by DOE by 1998) then the SNF fees are contractual in nature. This means that utilities are not limited to damage actions before the U.S. Court of Claims, but may exercise additional contractual remedies *preserved* by the Standard Contract (Article XI-Remedies, 129a), which could include a Court action to escrow the fees, to sue for restitution or specific performance, or to consider complementary self-held remedies.[15]

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[15] In *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 13436 (CA Fed 2000), the Court found that the administrative remedies provided for in the contract were inadequate and not applicable to the DOE's more significant breach. *See also Northern States Power Co. v. United States*, 224 F.3d 1361 (CA Fed 2000).

The lower Court also ignored the unequivocal ruling of the U.S. Court of Appeals in *Indiana Michigan Power* respecting the reciprocal nature of the SNF fee payment to DOE's performance under the Standard Contract. Instead, the Michigan court misconstrues the federal court's holding, and eviscerates its clear-cut holding. It engages in a linguistic sleight of hand when it moves from a sentence mischaracterizing Petitioners' argument to the assertion that payment of the NSF fees is mandated by statute: *"Indiana Michigan* [ ] does not hold that a utility's payment of SNF disposal fees is contingent on the DOE's putting into operation a disposal facility. . . The payment of SNF fees . . . is mandated by 42 USC 10222."

Neither the NWPA nor the Standard Contract provided for indefinite payment of the fees in exchange for indefinite non-performance of SNF disposal, as countenanced by the lower Court and MPSC. The NWPA and Standard Contract requires the **utility** to pay the SNF fee at least until January 31, 1998,[16] but is silent as to ratemaking.

Of course, even if the SNF fee were a separate stand-alone federal statutory mandate applicable to the utility, this does not mean that the MPSC as a state regulatory agency must *ipso facto* include the

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[16] Since DOE has defaulted in its reciprocal obligation, (i.e., payment of fees in exchange for DOE performance by January 31, 1998) there is no basis to simply assume that, on and after 1998, the utility SNF fee obligation continues indefinitely (without protective remedies).

costs of the fee in retail rates. Accord, *City of Detroit v. PSC*, 14 N.W.2d 784 (1944). Many costs may arise from federal mandates, but that does not necessarily translate into reasonable and prudent expenses to be recovered in rates.

The Michigan court also ignores the U.S. Court of Appeals' 1997 decision in *Northern States Power* that reinforced the court's ruling in *Indiana Michigan* and reiterated the conditional nature of DOE's contract obligation in exchange for the SNF fees being collected under the contract. The Court in *Northern States Power* did not foreclose other remedies, besides pursuing past damages in the U.S. Court of Claims, to either enforce the Standard Contract, or protect the fees paid thereunder, on a going forward basis. The Standard Contract also does not limit the remedies that a party to the contract can pursue to protect the fees being paid in the face of a default by the DOE.

The lower Court also misapplied the "federal filed rate doctrine" to this case, by citing the statutory fee and *ABATE v. Public Service Commission*, 192 Mich. App. 19, 22-27; 480 N.W.2d 589 (1991). The federal filed doctrine simply is not applicable here.[17] Unlike the *ABATE* case, the subject SNF fee costs of IMP are

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[17] The federal filed rate doctrine arose in cases such as *Mississippi Power and Light Co. v. Moore*, 487 U.S. 354, 372-376 (1988) and *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953 (1986) where, state ratemaking agencies sought to make their own cost and rate allocation determinations, different from those set by the Federal Energy Regulatory Commission ("FERC"), with respect to the rates of multi-state utilities regulated by the FERC.

not subject to FERC regulation but are reviewed under state (MPSC) retail regulation.

Contrary to the lower court here, the U.S. District Court in *Roedler et al. v. Dept of Energy et al.*, 1999 U.S. Dist Lexis 21613, (unpublished, 196a-234a), *affirmed, Roedler et al. v. DOE et al.*, 255 F.3d 1347 (2001), in a case where retail ratepayers sought refunds of SNF fees due to the contract default, held that, if any filed rate doctrine existed, it was with respect to the rates set by the Minnesota Public Utilities Commission ("MPUC"), which regulated the utility's retail rates. The same is true here.

The lower Court and MPSC decisions also improperly rest their result upon the unexplained claim that IMP would risk losing its license to operate its nuclear power plant if IMP refused to pay the SNF fees. In the present contract default context, it is untenable to suggest that the NRC or DOE could place itself in a superior position under the Standard Contract by penalizing or retaliating against a license holder for undertaking action to better enforce its contract or to protect the fees being paid under the failed contract.

The decisions below also fail to explain a basis for finding preemption under this Court's traditional preemption tests. This Court stated in *Schneidewind v. ANR Pipeline Co*, 485 U.S. 3293, 299-300 (1988):

> ". . . A pre-emption question requires an examination of congressional intent. . . . Congress explicitly may define the extent to which its enactments pre-empt state law."

The decisions below cite no language in the NWPA or Atomic Energy Act (or the Standard Contract or NRC regulation) to establish any Congressional intent to preempt state ratemaking jurisdiction over retail electric utilities, or to review nuclear power or SNF costs.

Congress must be deemed to know how to preempt states' authority when it intends to do so. The plain language of the NWPA indicates no Congressional intent to preempt otherwise applicable state ratemaking authority over SNF costs. This conclusion is confirmed by the U.S. District decision, as affirmed by the U.S. Court of Appeals, in *Roedler, supra*, wherein the Court exhaustively reviewed the NWPA, the Standard Contract, and DOE regulations, and found that the NWPA required SNF fee and other costs to be paid by the "owners and generators" of SNF, and included no specific reference or obligation involving ratepayers (e.g. see NWPA Section 111, 42 U.S.C. § 10131, 83a-85a).

The Atomic Energy Act ("AEA"), 42 U.S.C. § 2011 *et seq.*, and NRC regulations also do not preempt state ratemaking authority on this issue. The NRC and state commissions operate in separate spheres of subject matter jurisdiction – the NRC on safety issues, with the state commissions overseeing retail rates.

This federal/state regulatory division is reflected in NRC regulations that recognize state commission regulation of costs, rate collections, and trust oversight, related to the decommissioning of nuclear

plants.[18] Recent amendments of NRC regulations expressly recognize state regulatory requirements to establish additional assurances and funding mechanisms, over and above those required by the NRC, to assure decommissioning and ultimate SNF disposal.[19] The NRC's 2002 rulemaking expressly stated that the NRC intends no preemption of state regulation, and in fact endorses state action to ensure funds or security for decommissioning (including extending it to SNF sites.) NRC's regulations concerning the preparation of management and financial plans to decommission SNF sites, and to manage SNF until it is transferred to the DOE for disposal,[20] also do not create preemption issues.

The MPSC and lower Court decision below also do not explain a basis for preemption under the concepts of "field" or "conflict" preemption (e.g. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)). As noted, Congress did not intend or provide for "field" preemption here, and state ratemaking authority is not ousted (e.g. *Pacific Gas & Electric*, NWPA, *Roedler*).

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[18] NRC regulations, including 10 C.F.R. § 50.75 and 10 C.F.R. § 72.30.

[19] Rules and Regulations, Nuclear Regulatory Commission, 10 C.F.R. Parts 50 and 72, RIN 3150-AG 52, Decommissioning Trust Provisions, 67 FR 78332 *et seq.*, 67 FR 78339-78344; December 24, 2002.

[20] 10 C.F.R. § 72.30(a) and (b), and 20 C.F.R. 50.54 (bb).

Similarly, no "conflict" preemption applies. The MPSC could have accepted all of Petitioners' remedies without creating any actual conflict or impossibility of compliance by IMP with both MPSC remedies and federal law. Indeed, MPSC's consideration and adoption of one or more of Petitioners' remedies would have promoted Congress' objectives and purposes because it would energize the utility to do more to enforce the Standard Contract and ensure the safe disposal of SNF in accordance with the NWPA and Atomic Energy Act, while also protecting ratepayers.

There is no merit to the lower court's or MPSC's remarks that Petitioners' remedies were "extraordinary" or beyond the scope of Act 304.[21] What is extraordinary is not Petitioners' ratemaking remedies, but rather the lack of adequate utility enforcement of its SNF contract, and the utility's continued payment of SNF fees without protection or condition in the face of DOE's long-term contractual default. Additionally, the remedies cannot be viewed as "extraordinary" given that the MPSC has in the past undertaken just such alternative remedies, without legal impediment, including rate investigations, establishment of an MPSC regulated trust for nuclear plant decommissioning and SNF fees for pre-1983 nuclear generation, rate or performance bonds as a pre-condition to rate increases, among other remedies. Michigan courts also have affirmed MPSC

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[21] The ALJ in the generic complaint case, U-13771, exhaustively reviewed Petitioners' remedies and found that the MPSC has the authority to adopt all of them (533a-560a).

decisions on rate disallowances ordered under Act 304.[22]

The MPSC and Michigan lower court decisions that state regulation must or should ignore the default in the Standard Contract, and DOE's non-performance, and to refuse any ratemaking remedies to protect the ratepayers with respect to the fee payments, merely based upon the holding that the "fee is mandated by statute" and "by the Standard Contract" is unwarranted and erroneous. Neither the NWPA or the Standard Contract envisioned indefinite payment of fees by utilities (without conditions or protections) in exchange for indefinite (or permanent) non-performance by the DOE.

Ratepayers in Michigan have been foreclosed from challenging SNF fee cost/rate issues – not through the required factual and legal findings based upon the evidentiary record and briefing arguments – but rather upon the overwhelming but mistaken perception of the MPSC (and lower Courts) that MPSC review and the rendering of rate remedies relative to the SNF fee costs are preempted by federal law. The Michigan Courts have now also sought to foreclose review and ratemaking remedies on a permanent basis – by applying the decision in this case to bar the issue from rate cases based upon "collateral estoppel".

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[22] In *Consumers Power v. MPSC*, 493 N.W.2d 424 (1992), the court affirmed an Act 304 disallowance to protect ratepayers from an uneconomic fuel contract.

Contrary to the utility's claims below, the existence of a "federal mandate" by itself does not control the MPSC's ratemaking power to make an appropriate rate adjustment, or to fully scrutinize the facts including the utility's actions and non-actions, and to adopt conditions and remedies to protect ratepayers. The MPSC has its own unfettered independent duty and power to protect ratepayers.

2. This case involves issues of significant national importance.

The preemption issue presented is of national significance and importance.

Congress adopted the NWPA to "at last" resolve the important question of SNF disposal, after decades of unclear strategies and unrealized promises by federal agencies concerning how and when this nation would dispose SNF. The NWPA committed the federal government to disposing SNF on a reliable basis by requiring a contract that included the reciprocal obligation of fee payments to fund a disposal program in exchange for actual performance by a date certain.

The years since passage of the NWPA in 1982, and the signing of contracts in 1983, have yielded disappointing results. The contract was not honored by DOE. The "firm" deadline for performance was first ignored and then voided by DOE's inaction. The only aspect of the contract to be performed on time has been the payment of SNF fees, funded by ratepayers through rates or charges.

The nation's ratepayers have paid nearly 30 billion dollars to fund contributions to the Nuclear Waste Fund for post-April 1983 nuclear generation, and in one-time fees for pre-1983 nuclear generation. (603a) Meanwhile, the promised date for commencement of SNF disposal shifts repeatedly forward and becomes ever more distant. Besides the SNF fees, the nation's ratepayers increasingly pay for duplicative costs incurred by nuclear utilities due to the default in the Standard Contract (i.e. payment of SNF fees plus incurring higher costs due to the default).

The DOE has been in default of its SNF disposal contract for over 10 years, and there is no credible estimate as to when, if ever, DOE contract performance will occur. A single state, presently selected by Congress for a potential SNF repository, has clogged agency and court processes with numerous lawsuits challenging SNF disposal. Yet the ratepayers in the 35 states where SNF is piling up in aging plants or in outside SNF "storage sites" have not had their interests adequately represented, and the temporary SNF storage sites were never intended nor designed to be long-term or permanent.

State regulatory commissions and their staffs in some instances have investigated the SNF fee/cost rate issues and the default in the Standard Contract, but are frequently met with the argument that state regulatory authority is preempted. At the same time, utilities have less incentive to fully pursue legal remedies to enforce the Contract and protect the SNF fees so long as they can comfortably pass-on all such fee costs in customer rates. This Court's ruling that state regulatory commissions may in fact review SNF

fee cost/rate issues pursuant to their rate jurisdiction over utilities would provide an enhanced incentive for utilities to undertake greater action and ratepayer interests would be better protected.

Utility damage actions in the U.S. Court of Claims, while they may return some past incremental costs to utilities caused by DOE's default, do not accomplish some important objectives: to actually accomplish SNF disposal, to protect the ongoing fee payments under the breached contract, to ensure refunds to ratepayers of damage awards received (to recognize these were for costs included in rates), to ameliorate duplicative costs being paid by ratepayers, or to engender some modicum of future compliance under the Contract.

The major lingering preemption issue should be faced and resolved so our nation's institutions and ratepayers may definitely know how and where to proceed. The issue should be resolved to stop the continued erosion of the NWPA's objectives and purposes, to enforce the Standard Contract, and to prevent the disregard and evisceration of this Court's holdings in *Pacific Gas*, and the ruling of the federal courts in *Indiana Michigan*, *Northern States*, and other cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CLARK HILL PLC
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Counsel of Record

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Counsel for Petitioner

Date: August 25, 2008

APPENDIX

APPENDIX A

COURT OF APPEALS MICHIGAN

Docket No. 264859

[Filed April 24, 2007]

In re APPLICATION of INDIANA MICHIGAN POWER CO. Michigan Environmental Council and Public Interest Research Group in Michigan, *Appellants,*	)
v.	)
Michigan Public Service Commission and Indiana Michigan Power Company, *Appellees.*	)

Submitted April 5, 2007, at Lansing.
Decided April 24, 2007, at 9:20 a.m.

Indiana Michigan Power Company (IMPCo) filed an application in the Public Service Commission (PSC) for approval of its 2004 power supply cost recovery (PSCR) plan, which included the cost of fees paid to the United States Department of Energy (DOE) for the disposal of spent nuclear fuel (SNF). The PSC approved the plan over the objections of Michigan Environmental Council (MEC) and Public Interest Research Group in

Michigan (PIRGIM), which contended that IMPCo had not acted reasonably and prudently by paying fees for nuclear waste disposal to the DOE despite the fact that no federal nuclear waste disposal program currently exists. The PSC denied a motion for rehearing, and MEC and PIRGIM appealed.

The Court of Appeals *held*:

1. Appellants' argument that the PSC's decision is unlawful and unreasonable because it does not comply with Const. 1963, art 6, § 28 and MCL 24.285 is unsubstantiated. The basis for the PSC's decision is set out clearly in its order approving IMPCo's PSCR plan, and in particular in its order denying appellants' petition for rehearing. IMPCo presented evidence that payment of SNF disposal fees was mandated by federal law, and that failure to make the payments could lead to imposition of interest charges and possible loss of its license to operate its nuclear facility. The PSC was entitled to rely on this evidence to conclude that, in the absence of evidence that IMPCo acted unreasonably and imprudently with regard to the collection of SNF costs, it had no authority to impose remedies such as those appellants suggested, and appellants identified no statute or caselaw to the contrary.

2. The PSC acted in accordance with its statutory authority in concluding that IMPCo had not acted unreasonably or imprudently by continuing to pay SNF fees in light of testimony that payment was required by law, that other utilities were making SNF payments, that failure to make the payments could result in the loss of its operating licence, and that it

had supported litigation to compel the federal government to fulfill its duties with respect to SNF disposal. The case on which appellants rely for the proposition that payment of SNF fees is no longer mandatory did not hold that a utility's payment of SNF fees is contingent on the existence of a disposal facility; rather, it held that the DOE had a duty to accept SNF from utilities despite the fact that there was not yet an operational disposal facility.

3. The PSC correctly concluded that considering the appellants' recommendations and proposed remedies was beyond the scope of its jurisdiction in the absence of a determination that IMPCo's actions were unreasonable or unlawful.

Affirmed.

Clark Hill PLC (by *Don L. Keskey*), Lansing, for the Michigan Environmental Council and the Public Interest Research Group in Michigan.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *David A. Voges*, *Michael A. Nickerson*, and *Patricia S. Barone*, Assistant Attorneys General, for the Public Service Commission.

Honigman Miller Schwartz and Cohn LLP (by *Richard J. Aaron*) for the Indiana Michigan Power Company.

Before: SAAD, P.J., and HOEKSTRA and SMOLENSKI, JJ.

SAAD, P.J. Michigan Environmental Council and Public Interest Research Group in Michigan appeal orders of the Michigan Public Service Commission (PSC) that approved the 2004 power supply cost recovery (PSCR) plan filed by Indiana Michigan Power Company (IMPCo) and denied appellants' petition for rehearing. We affirm.

I. INTRODUCTION

MCL 460.6j(2) authorizes the PSC to include a PSCR clause in a utility's rate schedule.[1] A PSCR clause is "a clause in the electric rates or rate schedule of a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices." MCL 460.6j(1)(a). Each year, a utility with a PSCR clause in its rate schedule must file a PSCR plan for the upcoming year and a five-year forecast of power supply requirements. MCL 460.6j(3) and (4). The PSC approves, disapproves, or modifies the proposed PSCR plan. MCL 460.6j(6). After the end of the year, the PSC conducts a reconciliation case in which it makes adjustments to take into account the utility's true cost of supplying power. MCL 460.6j(12) and (13).

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[1] MCL 460.6j was added by 1982 PA 304 (Act 304).

IMPCo owns and operates a nuclear generating plant that supplies electricity to customers in Michigan. Spent nuclear fuel (SNF) is stored at an on-site facility at the plant. IMPCo entered into a standard contract with the United States Department of Energy (DOE), as required by the Nuclear Waste Policy Act (NWPA), 42 U.S.C. 10101 *et seq.* Under such a contract, the utility pays a fee to the DOE for a federal SNF disposal program. This program was scheduled to begin no later than January 31, 1998. At the time the briefs were filed, the DOE estimated that the program would not begin before 2010.[2] The utilities classify the SNF fee as a nuclear fuel expense and include the cost in their PSCR plans.

II. UNDERLYING FACTS AND PROCEEDINGS

IMPCo filed an application with the PSC seeking approval of its PSCR plan for the year 2004. In the administrative proceeding, appellants presented the testimony of a nuclear energy consultant who asserted that ratepayers were being charged excessive costs associated with nuclear waste and its disposal, including the cost of the SNF fee paid by IMPCo to the DOE. The witness contended that IMPCo had not acted reasonably and prudently regarding its continued payment of the SNF fee because it had

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[2] We take judicial notice that the Department of Energy website currently states that, under the "Best-Achievable Repository Construction Schedule," the repository will not begin receipt of SNF until March 31, 2017. U.S. Department of Energy, Civilian Radioactive Waste Management < http:// www. ocrwm. doe. gov/ ym_ repository/ about_ project/ index. shtml> (accessed April 11, 2007).

failed to take necessary action to mitigate or minimize the costs, or to protect ratepayers from the risk of loss of the amounts paid. Appellants contend that IMPCo failed to enforce its contract with the DOE, and failed to undertake self-help remedies. The witness opined that the PSC should disallow inclusion of IMPCo's SNF expense in IMPCo's PSCR clause. Alternatively, appellants aver that IMPCo should be required to refile its case and explain its actions concerning the SNF fees.

IMPCo presented a witness who opined that the utility had acted reasonably and prudently with respect to the collection and payment of SNF fees. The witness testified that if IMPCo refused to pay the SNF fee to the DOE, the Nuclear Regulatory Commission could determine that IMPCo's SNF disposal program was not viable, and could refuse to license IMPCo's nuclear plant. The witness also said that IMPCo had engaged in self-help, including participating in litigation to attempt to force the DOE to adhere to its obligations under the standard contract.

The PSC approved the PSCR plan filed by IMPCo. The PSC noted that SNF costs resulted from disposal of nuclear fuel rods and that, pursuant to MCL 460.6j(1)(a), a utility was entitled to recover disposal costs through its PSCR clause. The PSC found that IMPCo did not act unreasonably or imprudently with respect to the handling of SNF issues; accepted IMPCo's assertion that to cease paying SNF fees to the DOE could result in consequences such as suspension of IMPCo's license to operate its nuclear facility; disagreed with appellants' contention that utilities, and not ratepayers, were responsible for payment of

SNF fees; and observed that it had rejected appellants' arguments in previous cases. The PSC denied appellants' motion for rehearing.

III. ANALYSIS

The standard of review for PSC orders is narrow and well defined. MCL 462.25 provides that all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Michigan Consolidated Gas Co. v. Pub. Service Comm.*, 389 Mich. 624, 635-636, 209 N.W.2d 210 (1973). A party aggrieved by an order of the PSC has the burden to prove by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow the mandates of a statute or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint,* 460 Mich. 396, 427, 596 N.W.2d 164 (1999). An order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc. v. Pub. Service Comm.*, 377 Mich. 259, 279, 140 N.W.2d 515 (1966).

We must give due deference to the PSC's administrative expertise, and will not substitute our judgment for that of the PSC. *Attorney Gen. v. Pub. Service Comm. No. 2,* 237 Mich.App. 82, 88, 602 N.W.2d 225 (1999). However, we may not abandon our responsibility to interpret statutory language and legislative intent. *Miller Bros. v. Pub. Service Comm.*, 180 Mich App. 227, 232, 446 N.W.2d 640 (1989). Statutory interpretation is a question of law subject to

review de novo. As a general rule, we will defer to the construction placed on a statute by a government agency charged with interpreting it, unless the agency interpretation is not supported by the record or is otherwise unreasonable. *In re Canales Complaint,* 247 Mich.App. 487, 496, 637 N.W.2d 236 (2001). Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Michigan,* 254 Mich App. 675, 682, 658 N.W.2d 849 (2003).

1. DECISION ON SNF ISSUES

Appellants argue that the PSC's orders here are unlawful and unreasonable because the PSC's decision on the SNF issues is not supported by competent, material, and substantial evidence on the whole record as required by Const. 1963, art. 6, § 28, and does not make findings of fact and conclusions of law that allow for meaningful appellate review, as required by MCL 24.285. We disagree.

Appellants take the position that the PSC had the authority and the duty to undertake a broad investigation of IMPCo's actions with regard to SNF issues, and, at a minimum, disallow recovery of SNF costs through IMPCo's PSCR clause on the ground that IMPCo had acted unreasonably and imprudently with respect to collection of the costs from ratepayers and payment of the fees to the DOE.[3]

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[3] The PSC conducted the case according to the requirements set forth in MCL 460.6j. Appellants participated fully; the assertion

Appellants say that the PSC should have taken the position that IMPCo's request that it be allowed to recover SNF costs from ratepayers through its PSCR clause was presumptively unreasonable in light of the DOE's failure to commence an SNF disposal program, and should have required IMPCo to overcome that presumption. No authority allows the PSC to make such an assumption. Rather, the PSC must "evaluate the reasonableness and prudence of the decisions underlying" a utility's PSCR plan, and "approve, disapprove, or amend" the PSCR plan in light of that evaluation. MCL 460.6j(6).

IMPCo presented evidence that payment of the SNF fees was mandated by federal law and its standard contract with the DOE, and that failure to make the payments could lead to imposition of interest charges and possible loss of its license to operate its nuclear facility. The PSC was entitled to rely on the evidence presented by IMPCo on this issue, rather than the evidence presented by appellants. *Great Lakes Steel Div. of Nat'l Steel Corp. v. Pub. Service Comm.*, 130 Mich.App. 470, 481, 344 N.W.2d 321 (1983). Moreover, the PSC concluded that, in the absence of evidence that IMPCo acted unreasonably and imprudently with regard to the collection of SNF costs, it had no authority to impose additional remedies such as those suggested by appellants. Appellants point to no statute or caselaw that holds to the contrary.

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that appellants did not receive the notice required by MCL 460.6a(1) is without merit.

The basis for the PSC's decision is set out clearly in its order approving IMPCo's PSCR plan, and in particular in its order denying appellants' petition for rehearing. Appellants' argument that the PSC's decision is unlawful and unreasonable because it does not comply with Const. 1963, art. 6, § 28 and MCL 24.285 is unsubstantiated.

2. PROCEDURAL/DISCOVERY ISSUES

Appellants argue that the PSC's orders here are unlawful and unreasonable because the hearing referee and the PSC engaged in a one-sided review process. The referee denied appellants' motion to compel discovery of actions IMPCo might have taken to better enforce its standard contract with the DOE, and also denied appellants' motion to strike portions of IMPCo's testimony that appellants regard as conclusory. However, the referee granted IMPCo's motion to strike portions of appellants' expert evidence regarding SNF issues. The PSC affirmed these rulings. Appellants assert that this review process denied them due process, adequate judicial review, and notice and an opportunity to be heard. We disagree.

A party may not simply announce its position and then leave it to this Court to discover and rationalize the basis for its claims. *Wilson v. Taylor,* 457 Mich. 232, 243, 557 N.W.2d 100 (1998). Furthermore, a party may not give an issue cursory treatment with little or no citation of supporting authority. *Silver Creek Twp. v. Corso,* 246 Mich.App. 94, 99, 631 N.W.2d 346 (2001). Appellants' argument on this issue contains no specifics regarding what discovery matters they believe were improperly withheld, or what testimony

proffered by their witness was improperly stricken from the record. Appellants do not explain how the PSC would have decided this matter differently had the discovery material and testimony been before it on the record. The lack of specifics in appellants' argument leads us to conclude that this issue has been abandoned. *Yee v. Shiawassee Co. Bd. of Comm'rs,* 251 Mich.App. 379, 406, 651 N.W.2d 756 (2002).

3. EFFECT OF FEDERAL LAW

Appellants observe that IMPCo's basis for arguing that it was entitled to recover the SNF fees paid to the DOE was that payment of the fees is mandated by federal law. Appellants maintain that in *Indiana Michigan Power Co. v. Dep't of Energy,* 319 U.S.App.D.C. 209, 88 F.3d 1272 (1996), the court held that a utility's obligation to pay SNF fees was reciprocal to the DOE commencing SNF disposal by January 31, 1988. *Id.* at 214. *Moreover,* in *Northern States Power Co. v. Dep't of Energy,* 128 F.3d 754, 757 (C.A.D.C., 1997), the court stated that the DOE's obligation to meet the January 1998 deadline was unconditional. Appellants contend that a utility's duty to pay SNF fees is reciprocal to the DOE's duty to commence disposing of SNF in a timely manner and that, because the DOE did not fulfill its duty, a utility such as IMPCo has no duty to continue paying SNF fees to the DOE. Therefore, appellants assert, the PSC had the authority to protect ratepayers by denying IMPCo's request to recover SNF costs through its PSCR clause, or by requiring IMPCo to take other steps to protect ratepayers. We disagree.

Appellants' reliance on *Indiana Michigan Power Co., supra,* for the proposition that the payment of SNF fees is no longer mandatory, is misplaced. In that case, the court addressed the DOE's assertion that the DOE had no clear obligation under the NWPA to accept SNF from utilities absent the existence of an operational disposal facility. The court disagreed and concluded that under 42 U.S.C. 10222(a)(5), the DOE's duty to dispose of SNF was conditioned on the payment of disposal fees by utilities. Nothing in the statute indicated that the duty to dispose of SNF was tied to the commencement of operation of a disposal facility. *Id.* at 212-213. *Indiana Michigan Power Co.* does not hold that a utility's payment of SNF disposal fees is contingent on the DOE's putting into operation a disposal facility no later than January 31, 1998. The payment of SNF fees by a utility is mandated by 42 U.S.C. 10222.

A witness for IMPCo testified that IMPCo's actions with respect to collection of SNF costs from ratepayers and payment of SNF fees to the DOE were reasonable and prudent. The witness noted that (1) payment was required under IMPCo's standard contract with the DOE; (2) IMPCo's decision to pay the fees notwithstanding the federal government's delay in completing a disposal site was consistent with action taken by other utilities; (3) if IMPCo refused to pay the fees it risked losing its license to operate its nuclear power plant; and (4) IMPCo had supported litigation to compel the federal government to fulfill its duties under the NWPA.

The PSC has the discretion to consider a variety of factors when setting just and reasonable rates,[4] and the authority granted to the PSC is set out in MCL 460.6a and MCL 460.6j. The PSC acted in accordance with this authority and properly concluded that, in the absence of a finding of unreasonable or imprudent conduct on the part of a utility, it lacked the authority to impose the remedies suggested by appellants, including placing the burden of paying SNF fees on IMPCo's stockholders rather than on IMPCo's ratepayers. Appellants have not shown by clear and satisfactory evidence that the PSC's decision is unlawful or unreasonable. MCL 462.26(8).[5]

4. SCOPE OF JURISDICTION

In a PSCR proceeding, the PSC acts under the scope of authority granted to it in MCL 460.6j. Pursuant to that statute, the PSC was required to evaluate the reasonableness and prudence of IMPCo's

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[4] See *Detroit v. Public Service Comm.*, 308 Mich. 706, 718, 14 N.W.2d 784 (1944).

[5] Appellants argue that federal law does not preempt the PSC's ratemaking powers over SNF fees. We need not consider this argument because the PSC did not rely on the doctrine of federal preemption. Moreover, a state utility commission must allow, as a reasonable operating expense, a cost incurred pursuant to a federal statute, see *ABATE v. Pub. Service Comm.*, 192 Mich.App. 19, 22-27, 480 N.W.2d 585 (1991) (holding that states must give effect to rates approved by the Federal Energy Regulatory Commission), and SNF fees paid by IMPCo are mandated by statute, 42 U.S.C. 10222(a).

PSCR plan, and to approve, disapprove, or modify the plan on the basis of its conclusions.

Appellants argue that the PSC erred in concluding that consideration of their recommendations and proposed remedies was beyond the scope of its jurisdiction in a PSCR clause case. In a PSCR, the PSC has the statutory authority to conduct a full evidentiary hearing and to consider all relevant factors when determining what costs are recoverable. MCL 460.6j(6). Appellants maintain that the PSC had the authority to disallow recovery of SNF costs through IMPCo's PSCR clause. Alternatively, appellants assert that the PSC had the authority to impose lesser remedies, such as requiring IMPCo to submit detailed reports and data regarding SNF; place SNF disposal fees collected from ratepayers into an escrow account to ensure that the funds would be available for alternative SNF disposal programs in the event that the DOE does not commence its own disposal program; and file a performance bond or to secure an insurance policy to ensure proper performance of SNF disposal. We disagree.

IMPCo sought to recover costs related to SNF disposal and payment of SNF fees in its PSCR clause. The PSC did not find that IMPCo acted unreasonably or imprudently with respect to SNF disposal issues and payment of SNF fees to the DOE. Appellants cite no statute or caselaw that holds that in a PSCR proceeding in which no finding that a utility engaged in unreasonable or imprudent conduct has been made, the PSC is authorized to go beyond approving the PSCR application to adopt remedies such as those suggested by appellants. The PSC correctly concluded

that if it determines that a utility's actions are reasonable and lawful, it has no authority to adopt extraordinary remedies such as those proposed by appellants. See *Attorney General, supra* at 88.

5. APPELLATE PRECEDENT

Appellants argue that this Court's decision in *Michigan Environmental Council v. Pub. Service Comm*[6] does not serve as precedent to support affirmance of the PSC's decision for several reasons. First, the PSC proceeding reviewed in that case concerned two Wisconsin utilities that served small portions of the Upper Peninsula of Michigan and did not store SNF in Michigan, whereas in this case, IMPCo serves many Michigan customers and stores SNF in an on-site facility in Michigan. Second, the appellants did not seek outright disallowance of recovery of the SNF costs, as they did here. Third, in the opinion in that case, this Court acknowledged that issues raised by the appellants were appropriate for consideration, albeit not in a PSCR proceeding. Fourth, the PSC noted that SNF disposal issues are significant. Finally, because the opinion is unpublished, the PSC's reliance on it is erroneous. We disagree.

This Court's decision in *Michigan Environmental Council, supra,* is unpublished, and therefore does not constitute binding precedent. MCR 7.215(C)(1).

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[6] Unpublished opinion per curiam of the Court of Appeals, issued December 9, 2003, 2003 WL 22902853 (Docket Nos. 240403, 240406).

Nevertheless, we consider its analysis to be persuasive. See, e.g., *Watson v. Bureau of State Lottery,* 224 Mich.App. 639, 648, 569 N.W.2d 878 (1997). Here, the PSC was entitled to note that its rejection of appellants' issues had been upheld in other proceedings. The arguments raised by appellants in *Michigan Environmental Council* were substantially similar to those raised here.

IV. CONCLUSION

For the reasons set forth in this opinion, we affirm the PSC's orders approving IMPCo's PSCR application and denying appellants' petition for rehearing.

APPENDIX B

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

Case No. U-13919

[Filed August 1, 2005]

In the matter of the application of	)
INDIANA MICHIGAN POWER	)
COMPANY for approval of a power	)
supply cost recovery plan and for	)
authorization to charge monthly	)
power supply cost recovery factors	)
for calendar year 2004.	)
	)

At the August 1, 2005 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chairman
Hon. Laura Chappelle, Commissioner
Hon. Monica Martinez, Commissioner

ORDER

1. *Procedural History*

On May 31, 2005, the Michigan Environmental Council and the Public Interest Research Group in

Michigan (MEC/PIRGIM) filed a petition for reopening and rehearing of the Commission's April 28, 2005 order in this matter, in which the Commission approved Indiana Michigan Power Company's (I&M) 2004 power supply cost recovery (PSCR) plan and factors. MEC/PIRGIM contend that, pursuant to Rules 401 and 403, R460.17401 and R460.17403, the decision of the Commission must be reopened and reheard because there has been a change in the facts or law that requires development of a full and complete record, and/or because of newly discovered evidence or a claim of error.

Responses in opposition to MEC/PIRGIM's petition for reopening and rehearing were filed on June 21, 2005, by I&M and the Commission Staff (Staff).

2. *Positions of the Parties*

In its April 28, 2005 order, the Commission rejected several arguments made by MEC/PIRGIM concerning spent nuclear fuel (SNF). The Commission concluded that I&M had not acted unreasonably or imprudently in its handling of SNF payments, and found that I&M should not unilaterally cease making payment of its SNF fees to the Department of Energy's (DOE) Nuclear Waste Fund, despite the federal government's ongoing default on its obligation to build and operate a geologic repository for SNF. The Commission found that an interruption of payments could risk several adverse consequences, including non-renewal of I&M's nuclear power plant license, suspension of the standard contract between I&M and the DOE, and I&M's lack of access to any federal repository for SNF that may eventually be operational. *See,* April 28, 2005

order in Case No. U-13919, pp. 10-11. The Commission found that PSCR customers are responsible for the payment of SNF fees, because the fees cover disposal costs pursuant to MCL 460.6j(1)(a). *Id.* The Commission further found that the contested PSCR case is not the proper forum in which to interject broad-based SNF issues. *Id.* at pp. 12-13.

MEC/PIRGIM contend that the Commission's April 28, 2005 order should be reopened and reheard because the Commission erred in several respects on these issues. MEC/PIRGIM argue that the Commission's finding that I&M has been reasonable and prudent in its handling of SNF fees is incorrect, because I&M provided no information in its 2004 plan as to the steps that I&M intends to take to enforce its standard contract, to request a reduction in fees from the DOE, or to gain permission to use an escrow trust for the fees. MEC/PIRGIM themselves point out that they have made these same arguments before, in their initial brief and their exceptions.

MEC/PIRGIM argue that the Commission misconstrued their position, in that they state that they never asserted that I&M should cease making payments, but rather that I&M's shareholders should make the payments, rather than I&M's ratepayers. MEC/PIRGIM argue that the Commission has failed to determine that ratepayers are not paying for unnecessary expenses, or that ratepayers are paying the minimum possible amount for SNF fees. MEC/PIRGIM argue that, because SNF fees are subject to 1982 PA 304 (Act 304), it must follow that the review of such fees should take place in a PSCR proceeding. MEC/PIRGIM assert that the

Commission's actions are arbitrary and capricious, contrary to Act 304, in violation of the hearing requirements of the Administrative Procedures Act, and in violation of due process and equal protection principles.

The Staff argues that MEC/PIRGIM's petition fails to meet the requirements of Rules 401 and 403, because it does not set forth any newly discovered evidence, nor show any need for receiving further evidence, nor does it contain any new arguments.

I&M argues that MEC/PIRGIM make no real effort to satisfy the requirements of Rules 401 or 403, and simply reargue the presentations previously made in this case. I&M argues that MEC/PIRGIM fail to show that a reopening is necessary for the development of a full and complete record or that there has been a change in conditions of fact or law such that the public interest requires reopening. I&M argues that MEC/PIRGIM merely disagree with the Commission's findings. I&M argues that the record in the case shows that continued payment of SNF fees is reasonable and prudent, and that MEC/PIRGIM ignore the fact that the Commission reviewed the reasonableness and prudence of these costs as it is obligated to do pursuant to MCL 460.6j(6). I&M points out that, having found the costs to be reasonable and prudent, there is no legal basis for shifting these costs to shareholders.

I&M also points out that it is legally obligated to pay the SNF fees, in order to retain its nuclear power plant license and its ability to access the planned federal repository. I&M further points out that

escrowing of the funds is disallowed under the standard contract, and that one federal court has ruled that utilities may not escrow the funds, but must seek relief under the standard contract. I&M also points out that it pays the minimal amount of fees required under the standard contract.

3. *Discussion*

Rule 401 allows for the record of a proceeding to be reopened for the purpose of receiving further evidence when a reopening is necessary for the development of a full and complete record, or there has been a change in conditions of fact or law such that the public interest requires the reopening. R460.17401. The Commission may reopen a proceeding on the application of a party filed prior to the expiration of the statutory time period for rehearing. *Id.* Rule 403 provides that a petition for rehearing may be filed with the Commission within 30 days after service of the decision being petitioned, and may be based on a claim of error in fact or law, or on a claim of newly discovered evidence arising subsequent to the close of the record, or on unintended consequences resulting from compliance with the order.

The Commission has stated on numerous occasions that an application for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. *See,* October 14, 2004 order in Case No. U-13716, p. 2. An application for reopening requires a showing of a change in fact or law, such that the record in the case can no longer be considered full or complete.

MEC/PIRGIM make no effort whatsoever to present new evidence or even a new argument. MEC/PIRGIM cite no change in fact or law. Every substantive argument made by MEC/PIRGIM in their petition was made in their initial brief, and many of them were repeated thereafter in their reply brief, exceptions and replies to exceptions. MEC/PIRGIM make no convincing claim of error. The Commission finds that MEC/PIRGIM's petition demonstrates no grounds for reopening or rehearing and denies the petition.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 *et seq.*; 1919 PA 419, as amended, MCL 460.51 *et seq.*; 1939 PA 3, as amended, MCL 460.1 *et seq.*; 1982 PA 304, as amended, MCL 460.6h *et seq.*; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*

b. The petition for reopening/rehearing filed by MEC/PIRGIM should be denied.

THEREFORE, IT IS ORDERED that the petition of the Michigan Environmental Council and the Public Interest Research Group in Michigan for reopening and/or rehearing is denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

SEAL

MICHIGAN PUBLIC
SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

/s/ Laura Chappelle
Commissioner

/s/ Monica Martinez
Commissioner

By its action of August 1, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC
SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

/s/ Laura Chappelle
Commissioner

/s/ Monica Martinez
Commissioner

By its action of August 1, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

APPENDIX C

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

Case No. U-13919

[Filed April 28, 2005]

In the matter of the application of	)
INDIANA MICHIGAN POWER	)
COMPANY for approval of a power	)
supply cost recovery plan and for	)
authorization to charge monthly	)
power supply cost recovery factors	)
for calendar year 2004.	)
	)

At the April 28, 2005 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chairman
Hon. Laura Chappelle, Commissioner
Hon. Monica Martinez, Commissioner

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

On September 30, 2003, Indiana Michigan Power Company (I&M) filed an application, with supporting testimony and exhibits, seeking approval of its power supply cost recovery (PSCR) plan and factors for the 12-month period ended December 31, 2004, pursuant to 1982 PA 304 (Act 304), as amended, MCL 460.6h *et seq*.

I&M requested approval of PSCR factors of a negative 0.10 mills per kilowatt-hour (kWh) for its St. Joseph service area and a negative 1.35 mills per kWh for its Three Rivers service area.

Pursuant to due notice, a prehearing conference was held on November 25, 2003 before Administrative Law Judge Mark E. Cummins (ALJ). I&M, the Michigan Environmental Council and Public Interest Research Group in Michigan (MEC/PIRGIM), and the Commission Staff (Staff) participated in the proceedings.

The ALJ conducted an evidentiary hearing on March 10, 2004. During the hearing, I&M offered testimony and exhibits from five witnesses and MEC/PIRGIM offered testimony and exhibits from one witness.

The parties filed briefs on April 9, 2004. I&M and MEC/PIRGIM filed reply briefs on April 27, 2004.

The ALJ issued a Proposal for Decision (PFD) on June 4, 2004. All parties filed exceptions on June 18, 2004. I&M and MEC/PIRGIM filed replies to exceptions on June 28, 2004.

II.

EMISSION ALLOWANCES ISSUES

A system of emission allowances, which was developed in hopes of improving air quality, permits every power plant to emit pollution up to a designated level. Power plants are allotted a base number of "allowances." These allowances serve as a "ceiling" on the amount of pollutants that a plant can emit. If a plant exceeds its ceiling level of allowances, it can purchase additional allowances from others who have no need to utilize their full allotment of allowances. The purchased allowances effectively enable a power plant to pollute at levels above its ceiling.

In its 2004 PSCR plan, I&M's proposed St. Joseph rate area PSCR factor calculation included revenues of $12,678,000 from inter-company sales of sulfur dioxide (SO_2) emission allowances and costs of $4,345,000 associated with purchases of SO_2 emission allowances, resulting in a net credit to PSCR costs of $8,333,000. I&M also proposed increasing its 2004 PSCR costs by $1,014,000 for oxides of nitrogen (NO_X) emission allowance consumption.

The PFD called for the removal of the financial effects of both the SO_2 and the NO_X emission allowance

costs from I&M's PSCR factors.[1] The ALJ excluded the financial effect of SO_2 emission allowance costs and credits from PSCR costs because of a long-standing Commission policy to exclude the financial effects of SO_2 emission allowances from PSCR costs. In the PFD, the ALJ observed that "[t]he Commission has on numerous occasions, excluded from the computation of PSCR factors certain expenses related to emission allowance purchases, consumption, and trading." PFD, p. 18. The ALJ went on to state that the financial effects of emission allowances should be excluded from PSCR plan case costs because Act 304 allows recovery of costs that result from "fuel burned by the utility for electric generation." The PFD concluded that emission allowances are not costs that result from "fuel burned by the utility for electric generation," so it is appropriate to remove the financial effects of SO_2 emission allowances from PSCR plan case costs. The PFD was concerned that allowing the financial effects of emission allowances in the computation of the PSCR factor would open a Pandora's box that could include

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[1] The ALJ was uncertain whether the financial effects of SO_2 and NO_x emission allowances were included in the development of the PSCR costs for I&M's Three Rivers' rate area. I&M explains that the PSCR costs for its Three Rivers area are calculated differently from power supply costs for the St. Joseph area. The company states that PSCR costs for the Three Rivers area are computed under the Federal Energy Regulatory Commission (FERC) Net Energy Cost method, which excludes the financial effects of SO_2 and NO_x allowances from the calculation of the PSCR factor. Because emission allowance costs are excluded from PSCR costs for the Three Rivers rate area, the Commission need only consider the financial effects of emission allowances on the PSCR factor for the St. Joseph rate area.

recovery of many other types of costs through the PSCR factor. The PFD also concluded that NO_x allowances should be excluded in the same manner and for the same reasons as SO_2 allowances.

I&M and the Staff filed exceptions concerning the ALJ's recommendation to remove the financial effects of emission allowance costs from determination of I&M's PSCR factors.

I&M explains that the financial effects of its SO_2 emission allowances are different from other Michigan utilities because I&M's allowances result from an American Electric Power[2] (AEP) pooling arrangement that was developed under an Interim Allowance Agreement (IAA).[3] I&M states that the PFD did not appropriately consider the fact that the company's SO_2 emission allowance costs and credits were based on the IAA. According to I&M, the financial effect of emission allowances is similar to other AEP system pool related items that are includible in the PSCR, such as charges for energy received from the pool, credits for energy delivered to the pool, an allocated share of the costs and revenues associated with system sales, and capacity settlement credits. I&M points out that the IAA has been recognized by the Commission in prior cases. I&M contends that the financial effects of the IAA were adopted by the Commission in the December

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[2] I&M is a subsidiary of AEP.

[3] The IAA, which allocates the costs and benefits of SO_2 compliance among AEP companies, establishes a methodology and transfer price for the allocation of emission allowances among the major operating companies of the Eastern AEP system.

16, 1994 order in Case No. U-10708 and have been reflected in all of I&M's subsequent PSCR plans. Further, I&M states that its monthly 45-day reports filed with the Commission, and its PSCR factor calculation, have included emissions allowance settlement costs since the IAA was accepted by the Commission.

I&M also states that the FERC allows treatment of emission allowance costs in wholesale sales transactions. Further, I&M maintains that, to the extent that its PSCR factor reflects the effect of off-system sales, those sales already reflect partial recovery of the financial effects of emission allowances. The company concludes that it would be inconsistent to recognize the financial effects of emission allowances reflected in off-system sales as a credit, but deny the benefit of the financial effects of emission allowances from the remaining portion of the pooled power supply costs.

Citing the May 10, 1994 order in Case No. U-10335, which was a rate case proceeding for Consumers Energy Company (Consumers), I&M argues that the Commission decided that Consumers' PSCR clause should be amended to allow emission fees to be treated as booked cost of fuel:

> The Commission finds that the ALJ properly analyzed this issue in concluding that the emission fees may be treated as a booked cost of fuel. Were it not for the burning of fuel, there would be no emissions permit fees. As a result, there is a direct relationship between the

> emission fees and the fuel burned for generation.

Order, Case No. U-10335, p. 67.

Further, I&M notes that the Commission reaffirmed this finding in the August 18, 1994 order in Case No. U-10445, which involved Consumers' 1994 PSCR plan. In that order, the Commission found that it would be appropriate to evaluate the reasonableness of emissions permit fees in annual PSCR filings.

I&M asserts that the financial effects of emission allowances constitute an element of power supply costs pursuant to its PSCR clause. I&M contends that it is appropriate to include such costs in its PSCR factor because they vary with production/generation, and the coal burned, and are a necessary ingredient of the coal used. I&M also states that in the AEP system, the cost of the emissions are inextricably linked with the price of coal. As more coal is burned and more emissions are produced, more allowances are required.

The Staff also takes exception to the PFD's recommendation to remove the financial effects of SO_2 emission allowances from calculation of the PSCR factor. According to the Staff, the net effect of including both the expenses and credits associated with SO_2 emission allowances reduces I&M's 2004 PSCR expenses by $8,333,000 for the St. Joseph rate area. The Staff urges the Commission to reject the recommendation in the PFD so that I&M's St. Joseph rate area customers may receive the benefit of the $8,333,000 cost reduction.

Finally, although MEC/PIRGIM did not file an exception that specifically addresses this issue, in its reply to exceptions MEC/PIRGIM supported the positions taken by I&M and the Staff.

The Commission finds that the exceptions filed by I&M and the Staff with regard to SO_2 emission allowances are well taken. By including both the costs and the credits associated with the emission allowances in its 2004 PSCR plan, the ratepayers in I&M's St. Joseph rate area are benefited by a $8,333,000 PSCR cost reduction. The May 10, 1994 order in Case No. U-10335 and the August 18, 1994 order in Case No. U-10445 support I&M's position that emissions allowances qualify for inclusion as PSCR expenses. Moreover, commencing in 1995, I&M's PSCR cases have included such costs in the calculation of the PSCR factors for its St. Joseph rate area. Given these circumstances, the Commission is persuaded that I&M's and the Staff's exceptions should be granted.

I&M also requests that the Commission reject the PFD's exclusion of NO_x emission allowance costs from PSCR costs. I&M states that NO_x allowances are properly includible in the calculation of the PSCR factor. I&M also states several recent Commission decisions support its position. The Staff and MEC/PIRGIM agree with the result urged by I&M on this issue.

In the January 21, 2003 order in Case No. U-12725, the Commission found that Wisconsin Electric Power Company should be authorized to implement a request for deferred accounting, escrow, and reconciliation treatment of the utility's NO_x costs. Order, Case No.

U-12725, p. 4. Additionally, in the November 23, 2004 order in Case No. U-13808, the Commission approved recovery by The Detroit Edison Company of NO_x allowances expenses as a PSCR cost. Order, Case No. U-13808, p. 112. Based on the positions adopted on NO_x costs in Cases Nos. U-12725 and U-13808, the Commission finds that it is consistent for I&M to include NO_x emission allowances costs in the calculation of its PSCR factor in this case.[4]

III.

LINE LOSS FACTOR ISSUE

MEC/PIRGIM claimed that the I&M's PSCR costs were overstated by $126,000 to $144,000 for Michigan jurisdictional customers because of errors caused by including company use and line losses in the calculation of the spent nuclear fuel (SNF) fees. MEC/PIRGIM contended that I&M's calculation of SNF fees may be overstated by 12 to 14 percent as a result of failing to subtract company use and line losses from nuclear energy generated, and then erroneously increasing SNF fees by the line loss factor. MEC/PIRGIM insisted that the SNF fee was owed on net electric energy generated, as opposed to gross electric energy generated. Because MEC/PIRGIM was uncertain whether I&M had used gross or net generation to calculate the SNF fee payable to the U.S.

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[4] The rulings with regard to the SO_2 and NO_x emission allowance issues render moot MEC/PIRGIM's Exception III, which alleged that the result recommended in the PFD formed the basis for a "notice and hearing" violation.

Department of Energy (DOE), MEC/PIRGIM asked the Commission to clarify that the SNF fee should be calculated based on generation after company use and line losses from the busbar to the customer are subtracted out.

I&M maintained that the SNF fees paid to the DOE were correctly computed based on net generation. I&M asserted that MEC/PIRGIM confused the calculation of the SNF fee cost with the calculation of the PSCR factor for purposes of collecting that cost. Although MEC/PIRGIM alleged that fees should be paid in accordance with the amount of nuclear energy generated and sold, AEP apparently calculated its fees based upon net energy at the source, not net energy generated and sold. I&M argued that the use of line losses with respect to the calculation of a PSCR factor does not change the actual calculation of the SNF fee cost to be paid by AEP to the DOE during 2004.

The ALJ agreed with the utility. The ALJ found that confirmation that the SNF fee was based on 1 mill per kWh of electricity "generated and sold" is shown by the fact that total projected post-1983 SNF disposal fee costs are slightly less than 1 mill per kWh of projected net nuclear generation.

The Commission finds that I&M's calculation of SNF fees takes into account losses from the plant to the customer because the fees were calculated based on net generation times an SNF fee factor that was reduced for losses. To derive net generation, gross generation is reduced by company use and internal losses. Evidence of the fee being computed based on net generation is shown for January 2004 on Exhibit

A-3, page 1, line 1, which for the month of January, shows net generation of 716.8 gigawatt-hours (GWh). Net generation of 716.8 GWh is multiplied by a factor of .9350 (1.000 – 0.065 = .9350), to take into account losses from the busbar of the generating plant to the customer. For the month of January 2004, line 9 of Exhibit A-3, page 1, shows that I&M's multiplication of net generation of 716.8 GWh by 0.9350 mills/kWh correctly yields its SNF fee of $670,235 for that month.

IV.

OTHER SPENT NUCLEAR FUEL ISSUES

AEP entered into a "Standard Contract" with the DOE for disposal of SNF. The contract requires SNF storage fee payments to the DOE of 1 mill for each kWh of electricity generated and sold by a nuclear-fueled generating facility. As consideration for the payment received, the DOE was to provide a site for SNF storage by January 31, 1998. The DOE defaulted on its obligation under the contract when it did not provide a place for SNF storage by January 31, 1998. In spite of the DOE's default, I&M continues its payment of SNF fees. I&M included SNF fees of $2,312,250 in its 2004 PSCR costs.

Based on the testimony of Ronald C. Callen, a consulting witness with expertise regarding nuclear energy and SNF disposal issues, MEC/PIRGIM argue that it was unreasonable and imprudent for I&M to continue paying SNF fees to the DOE. Mr. Callen stated that I&M's 2004 PSCR plan and five-year forecast were incomplete because they failed to provide an explanation to justify the recovery of SNF fees,

related SNF storage, and other such costs that were included in its filing. According to Mr. Callen, I&M's attempt to collect its payments of the SNF fees should be disallowed because I&M failed to demonstrate it has been reasonable and prudent in incurring, mitigating, or minimizing SNF costs. Mr. Callen also stated that I&M's inactions have placed the risks associated with SNF storage and disposal issues entirely on its ratepayers.

Mr. Callen believed that I&M could simply stop paying all SNF fees because the SNF fee payments are a "reciprocal obligation" that is linked to the commencement of SNF disposal by the DOE. Because the DOE has defaulted on its obligation to take possession of SNF, MEC/PIRGIM argues that I&M's duty to pay the fee has ceased. In support for its position, MEC/PIRGIM cites federal court rulings holding that if one party defaults under a reciprocal agreement, the other party is not bound.

Mr. Callen also testified that I&M's ratepayers are not primarily responsible for the costs associated with the disposal of SNF. He stated that the Nuclear Waste Policy Act of 1982 (NWPA) placed the burden of paying for SNF costs on the "generators and owners of SNF". Accordingly, MEC/PIRGIM claims that because the NWPA says nothing about utility customers being responsible for paying SNF fees, I&M's ratepayers are not automatically required to reimburse utilities for incurred SNF costs.

Mr. Callen next testified that all SNF fees should be excluded from I&M's 2004 PSCR plan because I&M was lax in pursuing court action to protect the

interests of its ratepayers. MEC/PIRGIM argues that I&M's laxness in pursuing judicial remedies is an example of I&M's unreasonableness and imprudence.

Finally, MEC/PIRGIM criticize I&M's failures to pursue other SNF disposal sites, provide sufficient information about SNF fee costs, and take protective measures to guard ratepayer interests in SNF fees paid.

Citing 10 CFR 961.11 and Article 8 of the Standard Contract, I&M maintains that it is reasonable and prudent to continue paying SNF fees to the DOE because interest charges will accrue on unpaid SNF fees. Additionally, I&M states that even if the DOE were to suspend the Standard Contract as a result of its non-payment, the company's obligation to continue paying SNF fees would not be suspended. I&M also states that failure to make payments could permit the DOE to unilaterally suspend its obligation to take SNF from the company when a repository is developed or could lead to non-renewal of its nuclear power plant license by the Nuclear Regulatory Commission (NRC). I&M says the NRC's "viability assessment" dictates that if a utility does not have a place to put SNF, it will not have a license to operate a facility that brings electricity to the community. Under the NRC's "viability assessment," the DOE is the only acceptable source for storage of spent nuclear fuel.

The Commission concludes that I&M has not acted unreasonably or imprudently in its handling of SNF payments. In so doing, the Commission rejects all of MEC/PIRGIM's arguments to the contrary. Nothing in this record persuades the Commission that I&M

should unilaterally cease its payment of SNF fees to the DOE at this time. To do so might risk consequences, such as the imposition of interest payments levied on unpaid SNF amounts due or suspension of the standard contract, which might mean that I&M may not be able to store SNF at the DOE's repository if it is ever built. A failure to have access to a repository that stores SNF could result in a finding by the NRC that I&M's nuclear plant is not "viable", and could result in the NRC's nonrenewal of I&M's nuclear power plant license. Obviously, if the NRC does not renew I&M's nuclear power plant license, the utility's ability to provide electricity to its customers would be affected. These types of actions must be more fully examined, preferably in a generic proceeding, to access the risk to the utility, its ratepayers, and the general public.

The Commission also disagrees with MEC/PIRGIM's contention that PSCR customers are not responsible for payment of SNF fees. Act 304 governs the recovery of power supply costs from utility customers. Section 6j(1)(a) of Act 304 allows a utility with a PSCR clause to recover from its customers "booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices." MCL 460.6j(1)(a). SNF fees are expenses that result from disposal of nuclear fuel rods that have been used to generate electricity. Because PSCR costs include disposal costs, and because there has been no showing of unreasonableness and imprudence in I&M's

incurrence of SNF fees, the Commission finds that SNF fees are recoverable from its PSCR customers.

Further, the Commission finds that, contrary to MEC/PIRGIM's assertions, the record shows adequate court actions by I&M to address the DOE's default on its obligation to take possession of SNF. I&M established through federal court litigation that DOE has an unconditional obligation to dispose of SNF. *See, Indiana Michigan Power Co v Dept of Energy*, 88 F3d 1272 (1996). After the 1996 court ruling, the DOE informed the parties that it would not accept SNF by January 31, 1998. After being informed of the DOE's refusal to accept SNF, another affected utility sought a writ of mandamus. The Court of Appeals denied in part the writ, and held that the standard contract provided damages as a remedy for the DOE's default. *See, Northern States Power v Dept of Energy*, 128 F3d 754 (1997). I&M says that in *Northern States Power*, equitable remedies were denied because the Court found that contract damages were an available remedy for the DOE's default on its obligation under the Standard Contract. I&M also says that in *Northern States Power II v Dept of Energy*, 224 F3d 1361 (2000) and *Maine Yankee Atomic Power v United States*, 225 F3d 1336 (2000), the United States Court of Appeals confirmed that seeking contract damages should be the utility's first response to the DOE's default on its obligation to take possession of SNF. Because the court actions taken by I&M and other utilities are deemed adequate, no finding of unreasonableness and imprudence can be found based on a failure to seek judicial relief.

As for the remainder of MEC/PIRGIM's arguments, the Commission notes that they have repeatedly been considered and rejected by this Commission in the context of PSCR proceedings. Recently, the Commission stated:

> The Commission remains convinced that the efforts of the MEC/PIRGIM to interject broad based SNF issues into various types of individual contested cases is misplaced. In its November 20, 2001 orders in Cases Nos. U-12613 and U-12615, the Commission rejected similar efforts by MEC/PIRGIM to interject SNF issues into PSCR proceedings. In so doing, the Commission recognized that the SNF disposal issues confronting the electric utility industry are significant and that a solution will not be implemented any time soon. However, the Commission found that the MEC/PIRGIM's proposals did not have much bearing on the reasonableness or prudence of a utility's management. The Commission expressed its belief that (1) the problem was much larger than any individual utility's nuclear operation, (2) feasible alternatives to the construction of a permanent repository are not readily apparent, and (3) the Commission is unable to find that individual utilities are acting imprudently. Moreover, the Commission was persuaded that the MEC/PIRGIM's remedial proposals are beyond the scope of PSCR proceedings. The Court of Appeals has upheld the Commission on this issue. See, *Michigan Environmental Council v Public Service Comm,* unpublished opinion per curiam of the Court of Appeals,

decided December 9, 2003, Docket No. 240406. Therefore, the Commission finds that the ALJ acted appropriately in striking the testimony of Mr. Callen and in rejecting the MEC/PIRGIM's arguments on this issue.

February 28, 2005 order, Case No. U-13917, p. 11.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 *et seq.*; 1919 PA 419, as amended, MCL 460.51 *et seq.*; 1939 PA 3, as amended, MCL 460.1 *et seq.*; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*

b. I&M's 2004 PSCR plan should be approved.

THEREFORE, IT IS ORDERED that:

A. Indiana and Michigan Power Company's 2004 power supply recovery plan is approved.

B. The authorized 2004 power supply cost recovery factor for Indiana Michigan Power Company's St. Joseph rate area is a negative 0.10 mills per kilowatt-hour, relative to a power supply cost recovery base of 3.33 mills per kilowatt-hour recovered through the base rates approved in the order in Case No. U-9656 dated February 12, 1996.

C. The authorized 2004 power supply cost recovery factor for Indiana Michigan Power Company's Three

Rivers rate area is a negative 1.35 mills per kilowatt-hour, relative to a power supply cost recovery base of 9.72 mills per kilowatt-hour recovered through the base rates approved in the order in Case No. U-9205 dated March 9, 1989.

D. Within 30 days of the date of this order, Indiana Michigan Power Company shall file tariff sheets reflecting the power supply cost recovery base and factors approved by this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC
SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

(SEAL)

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of April 28, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC
SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of April 28, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

APPENDIX D

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

Case No. U-13919

[Filed June 4, 2004]

In the matter of the application of	)
INDIANA MICHIGAN POWER	)
COMPANY for approval of a power	)
supply cost recovery plan and factors	)
for calendar year 2004.	)
	)

PROPOSAL FOR DECISION

I.

HISTORY OF PROCEEDINGS

On September 30, 2003, Indiana Michigan Power Company (I&M), an operating subsidiary in the American Electric Power (AEP) system, filed an application, together with supporting testimony and exhibits, seeking approval of its power supply cost recovery (PSCR) plan and factors for the 12-month period ending December 2004. According to the application, I&M seeks to implement PSCR factors of negative 0.10 mills per kilowatt-hour (kWh) in its St.

Joseph rate area and negative 1.35 mills per kWh in its Three Rivers rate area. These proposed factors represent reductions of 2.53 mills per kWh and 0.63 mills per kWh, respectively, from the PSCR factors approved for the St. Joseph and Three Rivers rate areas in I&M's last plan case.

Pursuant to due notice, a prehearing conference was held on November 25, 2003 before Administrative Law Judge Mark E. Cummins (ALJ). I&M, the Michigan Environmental Council and the Public Interest Research Group in Michigan (collectively, the MEC), and the Commission Staff (Staff) participated in the proceedings. In the course of the prehearing conference, the ALJ granted the MEC's petition to intervene and established a schedule for the remainder of the case.

An evidentiary hearing was conducted on March 10, 2004, during which I&M offered testimony from five witnesses and the MEC presented testimony from one witness. The resultant record consists of 252 pages of transcript and 32 exhibits, 30 of which were received into evidence. Pursuant to the previously-established schedule, each of the parties filed briefs on April 8, 2004. I&M and the MEC filed reply briefs on April 27, 2004.

II.

STATUTORY REQUIREMENTS

Subsection 6j(3) of 1982 PA 304, as amended, MCL 460.6h et seq., (Act 304) requires a utility with a PSCR clause to annually file a complete PSCR plan

describing the expected sources of electric power supply and the changes in the cost of power supply anticipated over a future 12-month period. Based on this information, the utility is to request specific PSCR factors for each of the 12 months in its PSCR plan. The PSCR plan must also describe all major contracts and power supply arrangements for the 12-month period.

Subsection 6j(4) of Act 304 requires the utility to file--contemporaneously with the submission of its PSCR plan--a five-year forecast of its power supply requirements, its anticipated sources of supply, and its projections of power supply costs, all in light of its existing sources of electrical generation and sources of electric generation under construction.

Subsection 6j(5) of Act 304 provides that, after a utility files its PSCR plan and five-year forecast, the Commission is to conduct a proceeding to review the reasonableness and prudence of the PSCR plan and to establish PSCR factors for the period covered by the plan. It further provides that this review shall be conducted as a contested case proceeding pursuant to Chapter 4 of the Administrative Procedures Act of 1969, 1969 PA 306, as amended, MCL 24.201 et seq.

Subsection 6j(6) of Act 304 provides that, in its final order in a PSCR plan case, the Commission shall evaluate the reasonableness and prudence of the decisions underlying the utility's plan and shall approve, disapprove, or amend the plan accordingly. In evaluating the decisions underlying the utility's plan, this subsection continues, the Commission shall consider the cost and availability of the electrical generation open to use by the utility; the cost of

available short-term firm purchases; the availability of interruptible service; the ability of the utility to reduce or eliminate any firm sales to out-of-state customers (if the utility is not a multi-state utility whose firm sales are subject to other regulatory authority); whether the utility has taken all appropriate steps to minimize the cost of fuel; and other relevant factors. This subsection also provides that the Commission must, in its final order regarding the plan, specifically approve, reject, or amend the 12 monthly PSCR factors requested by the utility. Moreover, it demands that those factors shall not reflect any items that the Commission could reasonably anticipate would be disallowed under Subsection 6j(13)--which sets forth the criteria to be considered in a subsequent PSCR reconciliation concerning the 12-month period covered by the plan in question.

III.

TESTIMONY AND POSITIONS OF THE PARTIES

I&M presented direct--and, in some cases, rebuttal --testimony from five witnesses in support of its 2004 PSCR plan. I&M asserts that this testimony, along with its related exhibits, demonstrates that the decisions underlying its PSCR plan are reasonable and prudent. Thus, I&M contends, the Commission should approve its plan and authorize the utility's implementation of the PSCR factors set forth in its application.

I&M's first witness was Stephen D. Baker, the Manager of AEP Service Corporation's[1] Fuel Cost Recovery Administration. Mr. Baker provided a summary of I&M's long-term coal supply agreements, a short-term forecast of the utility's coal deliveries (complete with delivered prices for each of I&M's coal-fired generating units) for 2004, and a five-year forecast of the utility's total coal costs. According to Mr. Baker, the proposed coal purchases are intended to assure that "a continuous supply of coal of the appropriate quality . . . [is] delivered at the lowest cost over a period of years so as to promote the generation of the lowest cost per kWh of electricity, within the constraints of safety, reliability of supply, and environmental requirements." Tr. 71-72.

I&M's second witness was Douglas H. Malin, the Manager of its Nuclear Fuel Section. The primary purpose of Mr. Malin's testimony was to (1) describe the long-term, mid-term, and short-term contracts for the supply and disposal of nuclear fuel used at I&M's Cook Nuclear Plant, (2) discuss the reasonableness and prudence of all actions taken to minimize the utility's costs relating to nuclear fuel, and (3) support the nuclear fuel cycle costs used to compute I&M's total projected PSCR costs. In addition, his direct

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[1] AEP Service Corporation, acting as the agent for all utility operating companies in the AEP system, is responsible for procuring and delivering coal to each of I&M's coal-fired generating units, establishing coal inventory target levels for those units, and monitoring actual inventories throughout the year. It also provides load forecasts for each of the operating companies and develops electric generation forecasts for all generating units within the AEP system.

testimony specifically addressed the effects of the Energy Policy Act of 1992--which imposes an assessment on the utility for decontamination and decommissioning activities based on prior use of the Department of Energy's (DOE's) enrichment facilities--and set forth the steps taken to minimize I&M's 2004 nuclear fuel costs (such as eliminating its nuclear fuel inventory due to the ease of purchasing this fuel on the spot market). Moreover, Mr. Malin offered rebuttal testimony in response to claims that I&M should not have included--as part of its PSCR 2004 costs--any payments to the DOE for spent nuclear fuel (SNF) disposal, and that the utility erred in calculating its post-April 1983 SNF disposal costs.

The third witness offered by the utility was Scott C. Weaver, the Managing Director of Resource Planning and Operational Analysis for AEP Service Corporation. Mr. Weaver testified regarding how the monthly PSCR costs were computed for 2004, as well as how the annual cost figures were established for use in I&M's five-year forecast, for the St. Joseph and Three Rivers rate areas. As noted by Mr. Weaver, those figures accounted for such things as (1) fossil fuel expenses, (2) nuclear fuel rent, decontamination fund payments, and SNF disposal costs, (3) net sulfur dioxide emission credits, (4) nitrogen oxide emission costs, (5) the cost of purchased power, (6) charges for energy taken from the AEP power pool, (7) credits for surplus power delivered to the pool, (8) revenues for committed and uncommitted system sales, and (9) adjustments required to exclude affiliated transportation costs associated with firm load.

According to his computations, Mr. Weaver testified that the 2004 power supply costs for I&M's St. Joseph rate area will total approximately $72.7 million. Based on an estimated net energy requirement of 24,101 gigawatt-hours (Gwh) "before consideration of any line losses," he continued, this rate area's total PSCR costs for 2004 would be 3.017 mills per kWh. Tr. 149. With regard to the Three Rivers rate area, Mr. Weaver stated that 2004 power supply costs would total approximately $200.7 million and that the net energy requirement would be 24,185 GWh, thus resulting in PSCR costs of 8.301 mills per kWh.[2] As before, Mr. Weaver noted that these figures do not account for any line losses. *See*, Tr. 151.

I&M's fourth witness was Donald M. Schlegel, the Manager of AEP Service Corporation's Resource Planning Section. Mr. Schlegel provided the load forecast (including peak demand and annual energy requirements) for both I&M and the eastern part of the AEP system, as well as their respective levels of generating capacity and proposed reserve margins. Based on those figures, he went on to compute I&M's generation forecast on a month-by-month basis for 2004 and on an annual basis for the period covered by the utility's five-year forecast. Mr. Schlegel concluded by noting that I&M's generating units "are operated on an integrated basis (i.e., centrally dispatched) with the

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[2] The difference in the cost per kWh from one rate area to the next apparently arises--to at least some extent--from the fact that the computation of the Three Rivers rate area's PSCR factor is based on the Federal Energy Regulatory Commission's "Net Energy Cost" method. *See*, Tr. 150.

units of the other AEP companies to meet the total system load requirements of all the operating companies on the most economical basis." Tr. 185.

The utility's fifth and final witness was David L. Hille, a Senior Regulatory Consultant in I&M's Regulatory Services Department. In the course of his direct testimony, Mr. Hille described how--based on the underlying information provided by the preceding witnesses--I&M computed the 2004 PSCR factors proposed for use in the utility's St. Joseph and Three Rivers rate areas, as well as how the utility's proposed tariff sheet revisions were developed. Mr. Hille's computations, which included applying various loss factors and subtracting the previously-established PSCR cost base established for each of I&M's rate areas, resulted in proposed 2004 PSCR factors of negative 0.10 mills per kWh for the St. Joseph rate area and negative 1.35 mills per kWh for the Three Rivers rate area. Mr. Hille also provided rebuttal testimony in which he disputed claims that his application of I&M's loss factors somehow overstated the utility's projected SNF disposal fees.

The only other witness presented in this case was Ronald C. Callen, a consultant testifying on behalf of the MEC. Mr. Callen began by describing the electric industry's troubled history regarding SNF disposal. Specifically, he pointed out that although utilities with nuclear plants have long been required to contribute funds to the DOE for construction of a national spent fuel repository, little progress has been made toward opening such a facility. As a result, he points out, utilities like I&M are bearing the cost of storing SNF on site (either by expanding their storage pools or by

implementing dry cask storage programs) while concurrently paying for a federal disposal facility whose construction has not yet begun.

Mr. Callen went on to state that, in his opinion, insufficient support exists for including--as part of I&M's 2004 PSCR factors--the DOE's 1 mill per kWh SNF disposal fee. Rather, he continued, I&M has not been reasonable and prudent regarding its ongoing payment of that fee because it "has failed to undertake necessary or sufficient action to mitigate or minimize these costs, or to seek protection of the amounts" provided to the DOE in response to those SNF-related assessments. Tr. 229. Mr. Callen further contends that I&M incorrectly calculated the SNF fee included in I&M's proposed 2004 PSCR factors. This is based on his belief that the utility's calculations incorrectly adjusted the fee to include in-plant use and line losses.

In light of Mr. Callen's testimony, the MEC has raised two objections regarding the utility's plan. First, it argues that the Commission should disallow approximately $2,312,250 of I&M's alleged 2004 PSCR costs. That figure represents I&M's share (roughly 15%) of the projected $15,415,000 SNF disposal fee that the DOE will receive on behalf of the entire AEP system during 2004. Failing that, the MEC continues, the utility must be directed to file "a supplemental application detailing why the Commission should determine that continued flow-through in PSCR rates of all SNF fee costs remains reasonable and prudent." MEC's reply brief, p. 2. Only after reviewing that supplemental application and examining all additional testimony offered by the utility, the MEC asserts, would the Commission be in a position to rule in favor

of I&M's plan to continue passing on SNF disposal fees to its PSCR customers. Second, the MEC contends that the Commission should at least reduce any recoverable SNF fee costs by between $139,000 and $162,000 to correct what it views as a computational error by the utility regarding the effect of in-plant usage and line losses.

The Staff did not present any witnesses and simply "recommends that the Commission find I&M's plan to be reasonable and prudent." Staff's brief, p. 2. In so doing, however, it notes that one aspect of the utility's plan diverges from past Commission practice. Namely, the Staff points out, I&M's 2004 PSCR plan for its St. Joseph rate area includes the net effect of all expenses and credits arising from the utility's sulfur dioxide (SO_2) emissions allowances. Notwithstanding prior Commission orders specifically excluding the financial effects of emission allowance usage and trading from the computation of a utility's PSCR factor, the Staff concludes that it is reasonable--at least in this instance--to deviate from past practice.

IV.

DISCUSSION AND FINDINGS

As indicated above, only three areas of dispute exist with regard to I&M's 2004 PSCR plan. The first involves the MEC's claim that, at least thus far, the utility has not justified the continued recovery from PSCR customers of its post-1983 SNF disposal fee costs. The second issue relates to whether, assuming SNF disposal fees may be recovered through I&M's 2004 PSCR factors, the utility correctly computed the

total amount of those fees. The third and final issue concerns the utility's proposal to include the financial effects of certain emission allowances in the calculation of its PSCR factors. Each of these matters is discussed below.

Proposed Disallowance of SNF Fees

Based in large part on the testimony provided by Mr. Callen, the MEC asserts that I&M failed to adequately support its proposal to continue collecting from its PSCR customers--and forwarding to the DOE --the 1 mill per kWh SNF disposal fee. Although conceding that I&M has participated in lawsuits arising from the DOE's default (including an ongoing Court of Claims action seeking reimbursement of SNF disposal fees), the MEC contends that those actions "do not comprise the full panoply of remedies" that, at least in its opinion, the utility should pursue. MEC's brief, p. 11. Rather, the MEC argues, "any ongoing payments should be subject to protective terms and conditions." *Id.* at 12. Specifically, it continues, the utility should undertake self-help remedies, such as escrowing all SNF disposal fees collected from its PSCR customers pending a determination regarding whether the DOE will actually perform its disposal duties. Absent such steps, the MEC claims, I&M's continued collection of SNF disposal fees from its customers and distribution of those fees to the DOE is not reasonable and prudent. The MEC therefore seeks disallowance of all costs related to SNF disposal. At the very least, the MEC continues, the utility "should be required to re-file its PSCR plan case and forecast to include complete detail and information" concerning all SNF-related issues. *Id.* at 17.

I&M responds by noting that, pursuant to the Nuclear Waste Policy Act of 1982 (NWPA), all utilities with nuclear generation facilities were required to sign Standard Contracts with the DOE for the disposal of SNF. To ensure compliance with that requirement, the NWPA directed that the Nuclear Regulatory Commission "shall not issue or renew a license" for any nuclear power plant whose owner fails to enter into a contract with the DOE that, among other things, demands payment into the Nuclear Waste Fund of 1 mill per kWh of electricity generated and sold as a result of the plant's operation. *See*, 42 USC § 10222. According to I&M, those contracts require that all post-1983 SNF disposal fees be deposited quarterly with the U.S. Treasury. Moreover, they provide that any late payment of SNF disposal fees will result in the imposition of interest charges and that non-payment may serve to release the federal government from its obligation to ultimately take possession of the SNF. *See, i.e.*, 10 CFR, Part 961.

The regulatory structure described by I&M was confirmed by Mr. Malin. Specifically, Mr. Malin testified that:

> [T]here is what is known as a viability assessment performed by the Nuclear Regulatory Commission--I don't know chapter and verse, statutes, et cetera--but essentially it says, if you do not have a place to put your spent nuclear fuel, you do not have, or will not have, a license to operate a facility that brings electricity to the community.

> To date, the only acceptable source to permanently store nuclear fuel as part of this viability assessment is the Department of Energy; there are no other facilities, and this is what is accepted by the Nuclear Regulatory Commission.
>
> * * *
>
> [Moreover, we] don't want to make late payments because it would result in interest charges. DOE could suspend the contract, [but] it wouldn't relieve us of the obligation and we would run the risk of severe consequences, and that includes the viability determination by the Nuclear Regulatory Commission, the continuance of our operating license, and the operation and benefit of the facility.

Tr. 126-127. Furthermore, he testified that the utility has participated in at least four legal actions brought against the DOE in an attempt to force the agency to adhere to its obligations under the Standard Contract. *See*, Tr. 115-118.

As a result, I&M contends, the utility's continued recovery of post-1983 SNF fee costs from its PSCR customers, as well as its proposal to continue depositing those fees in the DOE's Nuclear Waste Fund throughout the 2004 PSCR plan year, is reasonable and prudent. I&M therefore asserts that the MEC's requested disallowance should be rejected. It further asserts that no justification exists for making the utility re-file its PSCR plan.

With regard to this issue, the Staff supports I&M's continued collection from its PSCR customers of the 1 mill per kWh SNF disposal fee. This is based on the Staff's view that the utility's proposal "is consistent with prior I&M PSCR cases," in which the Commission has consistently approved recovery of the SNF disposal fee costs through the utility's PSCR clause. Staff's brief, p. 2.

Regarding this matter, the first issue to address is whether I&M's plan to continue paying the DOE's post-1983 SNF disposal fees while storing SNF on site is reasonable and prudent. As noted in several cases previously before the Commission,[3] this does not involve the usual Act 304 exercise of properly assessing market forces and alternate supplies of energy. No market exists for SNF storage. Moreover, there are few, if any, reasonable alternatives. In fact, the only current option is on site storage, and the only future option appears to be the DOE's SNF disposal program. Given these limited options, the ALJ finds that it remains reasonable and prudent for I&M's customers to continue paying into the Nuclear Waste Fund--as required by the NWPA--during the 2004 PSCR plan year. Failure to do so (by unilaterally escrowing those payments, as advocated by the MEC) could result in the imposition of interest charges, lead to revocation of the utility's license to operate the Cook Nuclear Plant, and render I&M ineligible from someday using the DOE's permanent storage facility.

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[3] *See, i.e.*, the PFDs and orders issued in Cases Nos. U-12613, U-12614, and U-12615.

The second issue concerns the MEC's request that the Commission order I&M to re-file its PSCR plan in a manner that provides additional detail on all SNF-related matters. With regard to this issue, the ALJ agrees with the utility and finds that the testimony offered by Mr. Malin--which includes a discussion of (1) I&M's history concerning SNF disposal, (2) the steps the utility has taken to enforce its Standard Contract with the DOE, and (3) the reasons that post-1983 SNF disposal fees must continue to be paid by I&M--is adequate for purposes of this proceeding. Clearly, the MEC seeks a broader discussion regarding SNF disposal and the DOE's failure to adhere to the timeframes set forth in the Standard Contracts signed with numerous utilities across the country. However, that discussion is not germane to a PSCR plan case, where the primary focus is to provide the utility (hopefully, well before the close of the plan year) with direction regarding its proposed fuel purchases.

Undoubtedly, the SNF disposal issues confronting I&M and the nuclear generation industry as a whole are significant, both from an economic and an environmental standpoint. It is equally obvious that the long-awaited solution (in the form of a federally-operated, permanent storage facility) will not be implemented in accordance with the DOE's contractual timetable. For better or worse, the SNF storage issue is a political dilemma over which I&M, the Commission, and perhaps the DOE itself, have little influence. Thus, for the reasons stated above, the ALJ recommends that the Commission deny the MEC's request to either disallow the recovery of post-1983 SNF disposal fee costs through I&M's 2004 PSCR factor or order the utility to re-file its plan case.

I&M's Application of Loss Factors

The MEC further contends that the utility incorrectly computed the projected level of post-1983 SNF disposal fees. Specifically, Mr. Callen asserted that I&M applied various loss factors (which are designed to account for the cost of in-plant electric usage and line losses experienced over the utility's transmission and distribution system) to its projected 2004 SNF disposal fees, thereby overstating its proposed payments to the DOE by between $139,000 and $162,000. Because electric utilities are only required to pay a fee of 1 mill per kWh of electricity "generated and sold" as a result of their nuclear plants' operation, he continued, I&M's inclusion of loss factors in the calculation of its SNF disposal costs "may actually overstate the SNF fee by 12 percent or 14 percent . . .." Tr. 236-237.

I&M responds by claiming that the MEC's challenge to its calculation of the annual SNF disposal fee is misplaced. This is because, I&M asserts, the MEC failed to recognize the distinction between calculating the SNF fee cost for purposes of payment to the DOE, on the one hand, and computing the PSCR factor necessary for recovery of that cost, on the other. Based on testimony provided by Mr. Malin, the utility contends that its computation of the fee to be paid to the DOE is correct, having been calculated on the basis of 1 mill per kWh of electricity generated and sold. After that computation was complete (thus establishing the projected amount of SNF disposal fees to be paid to the DOE during 2004), the utility combined these and all other projected costs to compute its total 2004 PSCR costs. It is at this point,

I&M notes, that the utility's total PSCR costs were finally adjusted by Mr. Hille to reflect in-plant usage and line losses, thus resulting in the utility's proper 2004 PSCR factors for both the St. Joseph and Three Rivers rate areas. Therefore, the utility concludes, the MEC's arguments regarding the allegedly improper application of these loss factors should be rejected.

The ALJ agrees with the utility. As specifically noted by Mr. Malin, I&M's projected post-1983 SNF disposal fees "were calculated based on the rate of one mill per [kWh] of electricity generated and sold," in accordance with the NWPA. Tr. 96. This is supported by the fact that, according to Exhibits A-3 and A-4, total projected post-1983 SNF disposal fee costs are slightly less than 1 mill per kWh of projected net nuclear generation (thus confirming that the utility's figures are based on the amount of electricity "generated and sold" as opposed to simply the amount generated). As a result, the MEC is incorrect in its belief that I&M plans to include, as part of its total PSCR costs, post-1983 SNF disposal fees in excess of those actually owed to the DOE.

Moreover, as pointed out by Mr. Hille, the subsequent application of loss factors to I&M's total projected PSCR costs--when computing the utility's actual 2004 PSCR factors--does nothing to alter the SNF disposal fee. Specifically, he explained that:

> The total projected PSCR costs, the numerator, are divided by the net energy requirement, the denominator, to derive PSCR costs on a mills per kWh basis. The net energy requirement at that point reflects net energy at

> the source. The application of a loss factor is not adjusting PSCR costs, the numerator, but is adjusting the net energy requirement, the denominator, to reflect losses from the source to the point of usage – the customer. Therefore, the SNF fee developed by Mr. Malin is not adjusted.

Tr. 202-203. Because adjustments to account for in-plant usage and line losses have long been acknowledged as proper when computing the specific PSCR factors to be assessed to a utility's customers, and because these adjustments do not change the underlying costs (such as I&M's SNF disposal fee expense), the Commission should reject the MEC's requested disallowance.

Emission Allowances

The final issue to address is the utility's proposal to include in the computation of at least some of its 2004 PSCR factors[4] certain expenses and credits related to emission allowances. Specifically, when describing the manner in which he computed proposed factors for the St. Joseph rate area, Mr. Weaver testified that he

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[4] Although testimony and exhibits offered by Mr. Weaver address the extent to which emission allowance credits and expenses have been factored into I&M's proposed PSCR factors for the St. Joseph rate area, it appears that no such information was offered regarding the Three Rivers rate area. Obviously, if similar credits and expenses are included in the utility's calculation of proposed factors for the Three Rivers rate area, all recommendations concerning emission allowance credits and expenses would also apply to the final determination of that rate area's PSCR factors.

included SO_2 emission allowance expenses of $4,345,000 and credits of $12,678,000 (resulting in a net credit of $8,333,000). *See*, Tr. 139-140. That net credit was included on line 6 of Exhibit A-5, which reflects his computation of the St. Joseph rate area's 2004 PSCR factor.

The Staff points out that, in prior cases, "the Commission has determined that SO_2 allowance costs should be excluded from PSCR recovery." Staff's brief, p. 2. Nevertheless, the Staff believes that circumstances warrant including those costs, along with their countervailing credits, in this situation. Specifically, it notes that the AEP system functions under an operating agreement that requires each member to share certain system costs and benefits. Moreover, the Staff continues, compliance with SO_2 emission limits is being met on a system-wide basis. "Given that I&M's customers are paying their portion of the costs for AEP system SO_2 compliance," the Staff contends, those customers are entitled to their portion of the benefits arising from AEP's sale of unused SO_2 emission allowances. *Id.* Thus, notwithstanding the Commission's prior rulings to the contrary, the Staff supports I&M's inclusion of the $8,333,000 net credit when computing its 2004 PSCR plan costs. Neither the utility nor MEC specifically addresses this issue in its briefs or reply briefs.

The Commission has, on numerous occasions, excluded from the computation of PSCR factors the financial effects of emission allowance purchases, consumption, and trading. For example, in its September 12, 1997 order in Case No. U-10710-R, the Commission specifically held that revenues and costs

related to SO_2 allowances should not be passed through a utility's PSCR clause. Similarly, in its November 11, 2001 order in Case No. U-12615, the Commission ruled that costs relating to things like ash disposal, fuel handling, dry cask SNF storage, and SO_2 emissions allowances should not be included in the computation of a PSCR factor. These decisions were based on the Commission's "longstanding administrative practice [of construing] Act 304 to exclude those expenses from 'the booked costs . . . of fuel burned by the utility for electric generation,' which are recoverable through a PSCR clause." November 20, 2001 order in Case No. U-12615 at p. 4 [quoting MCL 460.6j(1)(a)].

Clearly, the Commission, as an administrative agency, has the right to change course on this issue. Doing so in the present case is particularly tempting in that, at least for 2004, it would provide I&M's PSCR customers in the St. Joseph rate area with a net SO_2 emissions allowance credit estimated at over $8.3 million. However, it would also run the risk of opening a virtual Pandora's box with regard to cost recovery via the PSCR process. Specifically, approving I&M's current proposal could throw open the door to future recovery, through various utilities' PSCR factors, of SO_2 allowance costs, ash disposal fees, fuel handling expenses, dry cask storage costs, and the like (all of which have previously been found by the Commission to be beyond the scope of Act 304). This risk, when coupled with the fact that these costs do not stand in close relationship to "fuel burned by the utility for electric generation"--as required by Section 6j(1)(a) of Act 304--militates against departing from the Commission's prior line of decisions. The ALJ

therefore recommends removing from the computation of I&M's 2004 PSCR factors all expenses and credits relating to the utility's SO_2 emissions allowances.

This recommendation, however, raises a related issue. Specifically, both Mr. Weaver's testimony and line 7 of Exhibit A-5 indicate that I&M seeks to include $1,014,000 of nitrogen oxide (NO_X) emission allowance costs in the computation of its 2004 PSCR factors for the St. Joseph rate area. According to Mr. Weaver, these costs are determined in the same basic manner as SO_2 emission allowance costs, except that unlike the SO_2-based expenses (which occur year-round), NO_X emission allowances are consumed only during the "ozone season" months of May through September. Tr. 142.

Nowhere in their briefs do the parties discuss the propriety of including these costs in the calculation of I&M's PSCR factors. Nevertheless, it seems obvious that the cost of NO_X emission allowances should be treated the same, at least for purposes of Act 304, as SO_2 emissions allowance costs. Therefore, consistent with the previous recommendation, the ALJ concludes that I&M's $1,014,000 of projected NO_X emission allowance costs also should be removed from the calculation of its 2004 PSCR factors for the St. Joseph rate area.

As can be seen by reference to Exhibit A-5, implementation of the ALJ's recommendations regarding SO_2 and NO_X emission allowances requires striking all figures set forth on lines 6 and 7 of that document. This has the effect of increasing the total cost figures on lines 24 and 26 of that exhibit by

$7,319,000 (which is the difference between the utility's net projected $8,333,000 SO_2-based credit and its expected $1,014,000 NO_x-based expense). As a result, estimated 2004 power supply costs for I&M's St. Joseph rate area would total $80,025,000 or 3.321 mills per kWh before consideration of any line losses. When these figures are substituted for the numbers initially included on Exhibit A-26 (at lines 3 and 5, respectively), they produce an adjusted 2004 PSCR factor of 0.22 mills per kWh for application in I&M's St. Joseph rate area.[5]

Finally, as mentioned in footnote 4, *supra*, it is unclear whether any similar emission allowance expenses or credits are included in I&M's calculation of its proposed factors for the Three Rivers rate area. If they are, adjustments like those recommended for the St. Joseph rate area's 2004 PSCR factors (to remove the effect of SO_2 and NO_x emission allowance expenses and credits) must also be made to the factors approved for use in the Three Rivers rate area.

V.

CONCLUSION

In light of the testimony and exhibits received in this case, the ALJ recommends finding that, with the single modification discussed above, I&M's 2004 PSCR

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[5] Based on information included in the utility's application, this adjusted PSCR factor would still represent a reduction of 2.21 mills per kWh from the factors approved for the St. Joseph rate area in I&M's most recent plan case.

plan is reasonable and prudent, and should be approved. As for that modification, the ALJ recommends that the Commission order I&M to remove from the calculation of its PSCR factors any and all effects of SO_2 and NO_x emission allowance expenses and credits.

Finally, it should be noted that any arguments not specifically addressed in this Proposal for Decision were deemed to be irrelevant to the ALJ's ultimate findings and conclusions in this proceeding.

MICHIGAN PUBLIC
SERVICE COMMISSION

/s/ Mark E. Cummins
Mark E. Cummins
Administrative Law Judge

June 4, 2004
Lansing, Michigan
dp

ISSUED AND SERVED: June 4, 2004

APPENDIX E

SUPREME COURT OF MICHIGAN

SC: 134474
COA: 264859
MPSC: 00-013919

[Filed May 27, 2008]

MICHIGAN ENVIRONMENTAL COUNCIL and PUBLIC INTEREST RESEARCH GROUP, Appellants,	)
v.	)
MICHIGAN PUBLIC SERVICE COMMISSION and INDIANA MICHIGAN POWER COMPANY, Appellees.	)

ORDER

On order of the Court, the motion for reconsideration of this Court's January 22, 2008 order is considered, and it is DENIED, because it does not appear that the order was entered erroneously. The motion for stay is DENIED.

[Seal of the Michigan Supreme Court Lansing]

I, Corbin R. Davis, Clerk of theMichigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 27, 2008 /s/ Corbin R. Davis
Clerk

APPENDIX F

SUPREME COURT OF MICHIGAN

SC: 134474
COA: 264859
MPSC: 00-013919

[Filed January 22, 2008]

MICHIGAN ENVIRONMENTAL COUNCIL and PUBLIC INTEREST RESEARCH GROUP, Appellants,	)
v.	)
MICHIGAN PUBLIC SERVICE COMMISSION and INDIANA MICHIGAN POWER COMPANY, Appellees.	)

ORDER

On order of the Court, the application for leave to appeal the April 24, 2007 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

[Seal of the Michigan Supreme Court Lansing]

I, Corbin R. Davis, Clerk of theMichigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 22, 2008 /s/ Corbin R. Davis
Clerk

APPENDIX G

COURT OF APPEALS, STATE OF MICHIGAN

Docket No. 264859
LC No. 00-013919

[Filed June 7, 2007]

Michigan Environmental Council	)
	)
v.	)
	)
MPSC	)
	)

Henry William Saad Presiding Judge

Joel P. Hoekstra, Michael R. Smolenski Judges

ORDER

The Court orders that the motion for correction of Court's decision is DENIED. The Court further orders that the motion for reconsideration is DENIED.

/s/ H. W. Saad
Presiding Judge

[Seal of Court of Appeals
of the State of Michigan]

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

June 7, 2007 /s/ Sandra Schultz Mengel
Date Chief Clerk

APPENDIX H

Nuclear Wast Policy Act of 1982, as amended, 42 U.S.C. § 10101 et seq. (Relevant Provisions)

CHAPTER 108—NUCLEAR WASTE POLICY

42 U.S.C. § 10101. Definitions

For purposes of this chapter:

(1) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(2) The term "affected Indian tribe" means any Indian tribe—

(A) within whose reservation boundaries a monitored retrievable storage facility, test and evaluation facility, or a repository for high-level radioactive waste or spent fuel is proposed to be located;

(B) whose federally defined possessory or usage rights to other lands outside of the reservation's boundaries arising out of congressionally ratified treaties may be substantially and adversely affected by the locating of such a facility: *Provided*, That the Secretary of the Interior finds, upon the petition of the appropriate governmental officials of the tribe,

that such effects are both substantial and adverse to the tribe;[1]

(3) The term "atomic energy defense activity" means any activity of the Secretary performed in whole or in part in carrying out any of the following functions:

(A) naval reactors development;
(B) weapons activities including defense inertial confinement fusion;
(C) verification and control technology;
(D) defense nuclear materials production;
(E) defense nuclear waste and materials by-products management;
(F) defense nuclear materials security and safeguards and security investigations; and
(G) defense research and development.

(4) The term "candidate site" means an area, within a geologic and hydrologic system, that is recommended by the Secretary under section 10132 of this title for site characterization, approved by the President under section 10132 of this title for site characterization, or undergoing site characterization under section 10133 of this title.

(5) The term "civilian nuclear activity" means any atomic energy activity other than an atomic energy defense activity.

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[1] So in original. The semicolon probably should be a period.

(6) The term "civilian nuclear power reactor" means a civilian nuclear powerplant required to be licensed under section 2133 or 2134 (b) of this title.

(7) The term "Commission" means the Nuclear Regulatory Commission.

(8) The term "Department" means the Department of Energy.

(9) The term "disposal" means the emplacement in a repository of high-level radioactive waste, spent nuclear fuel, or other highly radioactive material with no foreseeable intent of recovery, whether or not such emplacement permits the recovery of such waste.

(10) The terms "disposal package" and "package" mean the primary container that holds, and is in contact with, solidified high-level radioactive waste, spent nuclear fuel, or other radioactive materials, and any overpacks that are emplaced at a repository.

(11) The term "engineered barriers" means manmade components of a disposal system designed to prevent the release of radionuclides into the geologic medium involved. Such term includes the high-level radioactive waste form, high-level radioactive waste canisters, and other materials placed over and around such canisters.

(12) The term "high-level radioactive waste" means—

(A) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and

any solid material derived from such liquid waste that contains fission products in sufficient concentrations; and

(B) other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation.

(13) The term "Federal agency" means any Executive agency, as defined in section 105 of title 5.

(14) The term "Governor" means the chief executive officer of a State.

(15) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska Native village, as defined in section 3(c) of the Alaska Native Claims Settlement Act (43 U.S.C. 1602 (c)).

(16) The term "low-level radioactive waste" means radioactive material that—

(A) is not high-level radioactive waste, spent nuclear fuel, transuranic waste, or by-product material as defined in section 2014 (e)(2) of this title; and

(B) the Commission, consistent with existing law, classifies as low-level radioactive waste.

(17) The term "Office" means the Office of Civilian Radioactive Waste Management established in section 10224[2] of this title.

(18) The term "repository" means any system licensed by the Commission that is intended to be used for, or may be used for, the permanent deep geologic disposal of high-level radioactive waste and spent nuclear fuel, whether or not such system is designed to permit the recovery, for a limited period during initial operation, of any materials placed in such system. Such term includes both surface and subsurface areas at which high-level radioactive waste and spent nuclear fuel handling activities are conducted.

(19) The term "reservation" means—

(A) any Indian reservation or dependent Indian community referred to in clause (a) or (b) of section 1151 of title 18; or

(B) any land selected by an Alaska Native village or regional corporation under the provisions of the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.).

(20) The term "Secretary" means the Secretary of Energy.

(21) The term "site characterization" means—

(A) siting research activities with respect to a test and evaluation facility at a candidate site; and

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[2] See References in Text note below.

(B) activities, whether in the laboratory or in the field, undertaken to establish the geologic condition and the ranges of the parameters of a candidate site relevant to the location of a repository, including borings, surface excavations, excavations of exploratory shafts, limited subsurface lateral excavations and borings, and in situ testing needed to evaluate the suitability of a candidate site for the location of a repository, but not including preliminary borings and geophysical testing needed to assess whether site characterization should be undertaken.

(22) The term "siting research" means activities, including borings, surface excavations, shaft excavations, subsurface lateral excavations and borings, and in situ testing, to determine the suitability of a site for a test and evaluation facility.

(23) The term "spent nuclear fuel" means fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing.

(24) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.

(25) The term "storage" means retention of high-level radioactive waste, spent nuclear fuel, or transuranic waste with the intent to recover such

waste or fuel for subsequent use, processing, or disposal.

(26) The term "Storage Fund" means the Interim Storage Fund established in section 10156 (c)[3] of this title.

(27) The term "test and evaluation facility" means an at-depth, prototypic, underground cavity with subsurface lateral excavations extending from a central shaft that is used for research and development purposes, including the development of data and experience for the safe handling and disposal of solidified high-level radioactive waste, transuranic waste, or spent nuclear fuel.

(28) The term "unit of general local government" means any borough, city, county, parish, town, township, village, or other general purpose political subdivision of a State.

(29) The term "Waste Fund" means the Nuclear Waste Fund established in section 10222 (c) of this title.

(30) The term "Yucca Mountain site" means the candidate site in the State of Nevada recommended by the Secretary to the President under section 10132 (b)(1)(B) of this title on May 27, 1986.

(31) The term "affected u..it of local government" means the unit of local government with jurisdiction

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[3] See References in Text note below.

over the site of a repository or a monitored retrievable storage facility. Such term may, at the discretion of the Secretary, include units of local government that are contiguous with such unit.

(32) The term "Negotiator" means the Nuclear Waste Negotiator.

(33) As used in subchapter IV of this chapter, the term "Office" means the Office of the Nuclear Waste Negotiator established under subchapter IV of this chapter.

(34) The term "monitored retrievable storage facility" means the storage facility described in section 10161 (b)(1) of this title.

(Pub. L. 97–425, § 2, Jan. 7, 1983, 96 Stat. 2202; Pub. L. 100–202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329–104, 1329–121; Pub. L. 100–203, title V, § 5002, Dec. 22, 1987, 101 Stat. 1330–227.)

* * *

SUBCHAPTER I—DISPOSAL AND STORAGE OF HIGH-LEVEL RADIOACTIVE WASTE, SPENT NUCLEAR FUEL, AND LOW-LEVEL RADIOACTIVE WASTE

* * *

Part A—Repositories for Disposal of High-Level Radioactive Waste and Spent Nu-clear Fuel

42 U.S.C. § 10131. Findings and purposes

(a) The Congress finds that—

(1) radioactive waste creates potential risks and requires safe and environmentally acceptable methods of disposal;

(2) a national problem has been created by the accumulation of (A) spent nuclear fuel from nuclear reactors; and (B) radioactive waste from (i) reprocessing of spent nuclear fuel; (ii) activities related to medical research, diagnosis, and treatment; and (iii) other sources;

(3) Federal efforts during the past 30 years to devise a permanent solution to the problems of civilian radioactive waste disposal have not been adequate;

(4) while the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and such spent nuclear fuel as may be disposed of in order to protect the public health and safety and the environment, the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel;

(5) the generators and owners of high-level radioactive waste and spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of such waste and spent fuel until such waste and spent fuel is accepted by the Secretary of Energy in accordance with the provisions of this chapter;

(6) State and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel; and

(7) high-level radioactive waste and spent nuclear fuel have become major subjects of public concern, and appropriate precautions must be taken to ensure that such waste and spent fuel do not adversely affect the public health and safety and the environment for this or future generations.

(b) The purposes of this part are—

(1) to establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and such spent nuclear fuel as may be disposed of in a repository;

(2) to establish the Federal responsibility, and a definite Federal policy, for the disposal of such waste and spent fuel;

(3) to define the relationship between the Federal Government and the State governments with respect to the disposal of such waste and spent fuel; and

(4) to establish a Nuclear Waste Fund, composed of payments made by the generators and owners of such waste and spent fuel, that will ensure that the costs of carrying out activities relating to the disposal of such

waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel.

(Pub. L. 97-425, title I, §111, Jan. 7, 1983, 96 Stat. 2207.)

* * *

Part B—INTERIM STORAGE PROGRAM

42 U.S.C. § 10151. Findings and purposes

(a) The Congress finds that—

(1) the persons owning and operating civilian nuclear power reactors have the primary responsibility for providing interim storage of spent nuclear fuel from such reactors, by maximizing, to the extent practical, the effective use of existing storage facilities at the site of each civilian nuclear power reactor, and by adding new onsite storage capacity in a timely manner where practical;

(2) the Federal Government has the responsibility to encourage and expedite the effective use of existing storage facilities and the addition of needed new storage capacity at the site of each civilian nuclear power reactor; and

(3) the Federal Government has the responsibility to provide, in accordance with the provisions of this part, not more than 1,900 metric tons of capacity for interim storage of spent nuclear fuel for civilian nuclear power reactors that cannot reasonably provide adequate storage capacity at the sites of such reactors

when needed to assure the continued, orderly operation of such reactors.

(b) The purposes of this part are—

(1) to provide for the utilization of available spent nuclear fuel pools at the site of each civilian nuclear power reactor to the extent practical and the addition of new spent nuclear fuel storage capacity where practical at the site of such reactor; and

(2) to provide, in accordance with the provisions of this part, for the establishment of a federally owned and operated system for the interim storage of spent nuclear fuel at one or more facilities owned by the Federal Government with not more than 1,900 metric tons of capacity to prevent disruptions in the orderly operation of any civilian nuclear power reactor that cannot reasonably provide adequate spent nuclear fuel storage capacity at the site of such reactor when needed.

(Pub. L. 97-425, title I, §131, Jan. 7, 1983, 96 Stat. 2229.)

42 U.S.C. § 10152. Available capacity for interim storage of spent nuclear fuel

The Secretary, the Commission, and other authorized Federal officials shall each take such actions as such official considers necessary to encourage and expedite the effective use of available storage, and necessary additional storage, at the site of each civilian nuclear power reactor consistent with—

(1) the protection of the public health and safety, and the environment;
(2) economic considerations;
(3) continued operation of such reactor;
(4) any applicable provisions of law; and
(5) the views of the population surrounding such reactor.

(Pub. L. 97-425, title I, §132, Jan. 7, 1983, 96 Stat. 2230.)

* * *

SUBCHAPTER III—OTHER PROVISIONS RELATING TO RADIOACTIVE WASTE

42 U.S.C. § 10222. Nuclear Waste Fund

(a) Contracts

(1) In the performance of his functions under this chapter, the Secretary is authorized to enter into contracts with any person who generates or holds title to high-level radioactive waste, or spent nuclear fuel, of domestic origin for the acceptance of title, subsequent transportation, and disposal of such waste or spent fuel. Such contracts shall provide for payment to the Secretary of fees pursuant to paragraphs (2) and (3) sufficient to offset expenditures described in subsection (d) of this section.

(2) For electricity generated by a civilian nuclear power reactor and sold on or after the date 90 days after January 7, 1983, the fee under paragraph (1) shall be equal to 1.0 mil per kilowatt-hour.

(3) For spent nuclear fuel, or solidified high-level radioactive waste derived from spent nuclear fuel, which fuel was used to generate electricity in a civilian nuclear power reactor prior to the application of the fee under paragraph (2) to such reactor, the Secretary shall, not later than 90 days after January 7, 1983, establish a 1 time fee per kilogram of heavy metal in spent nuclear fuel, or in solidified high-level radioactive waste. Such fee shall be in an amount equivalent to an average charge of 1.0 mil per kilowatt-hour for electricity generated by such spent nuclear fuel, or such solidified high-level waste derived therefrom, to be collected from any person delivering such spent nuclear fuel or high-level waste, pursuant to section 10143 of this title, to the Federal Government. Such fee shall be paid to the Treasury of the United States and shall be deposited in the separate fund established by subsection (c) of this section.[1] In paying such a fee, the person delivering spent fuel, or solidified high-level radioactive wastes derived therefrom, to the Federal Government shall have no further financial obligation to the Federal Government for the long-term storage and permanent disposal of such spent fuel, or the solidified high-level radioactive waste derived therefrom.

(4) Not later than 180 days after January 7, 1983, the Secretary shall establish procedures for the collection and payment of the fees established by paragraph (2) and paragraph (3). The Secretary shall annually review the amount of the fees established by paragraphs (2) and (3) above to evaluate whether

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[1] See References in Text note below.

collection of the fee will provide sufficient revenues to offset the costs as defined in subsection (d) of this section. In the event the Secretary determines that either insufficient or excess revenues are being collected, in order to recover the costs incurred by the Federal Government that are specified in subsection (d) of this section, the Secretary shall propose an adjustment to the fee to insure full cost recovery. The Secretary shall immediately transmit this proposal for such an adjustment to Congress. The adjusted fee proposed by the Secretary shall be effective after a period of 90 days of continuous session have elapsed following the receipt of such transmittal unless during such 90-day period either House of Congress adopts a resolution disapproving the Secretary's proposed adjustment in accordance with the procedures set forth for congressional review of an energy action under section 6421 of this title.

(5) Contracts entered into under this section shall provide that—

(A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and

(B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter.[1]

(6) The Secretary shall establish in writing criteria setting forth the terms and conditions under which such disposal services shall be made available.

(b) Advance contracting requirement

(1) (A) The Commission shall not issue or renew a license to any person to use a utilization or production facility under the authority of section 2133 or 2134 of this title unless—

(i) such person has entered into a contract with the Secretary under this section; or

(ii) the Secretary affirms in writing that such person is actively and in good faith negotiating with the Secretary for a contract under this section.

(B) The Commission, as it deems necessary or appropriate, may require as a precondition to the issuance or renewal of a license under section 2133 or 2134 of this title that the applicant for such license shall have entered into an agreement with the Secretary for the disposal of high-level radioactive waste and spent nuclear fuel that may result from the use of such license.

(2) Except as provided in paragraph (1), no spent nuclear fuel or high-level radioactive waste generated or owned by any person (other than a department of the United States referred to in section 101 or 102 of title 5) may be disposed of by the Secretary in any repository constructed under this chapter unless the generator or owner of such spent fuel or waste has entered into a contract with the Secretary under this section by not later than—

(A) June 30, 1983; or
(B) the date on which such generator or owner commences generation of, or takes title to, such spent fuel or waste;

whichever occurs later.

(3) The rights and duties of a party to a contract entered into under this section may be assignable with transfer of title to the spent nuclear fuel or high-level radioactive waste involved.

(4) No high-level radioactive waste or spent nuclear fuel generated or owned by any department of the United States referred to in section 101 or 102 of title 5 may be disposed of by the Secretary in any repository constructed under this chapter unless such department transfers to the Secretary, for deposit in the Nuclear Waste Fund, amounts equivalent to the fees that would be paid to the Secretary under the contracts referred to in this section if such waste or spent fuel were generated by any other person.

(c) Establishment of Nuclear Waste Fund

There hereby is established in the Treasury of the United States a separate fund, to be known as the Nuclear Waste Fund. The Waste Fund shall consist of—

(1) all receipts, proceeds, and recoveries realized by the Secretary under subsections (a), (b), and (e) of this section, which shall be deposited in the Waste Fund immediately upon their realization;

(2) any appropriations made by the Congress to the Waste Fund; and

(3) any unexpended balances available on January 7, 1983, for functions or activities necessary or incident to the disposal of civilian high-level radioactive waste or civilian spent nuclear fuel, which shall automatically be transferred to the Waste Fund on such date.

(d) Use of Waste Fund

The Secretary may make expenditures from the Waste Fund, subject to subsection (c) of this section, only for purposes of radioactive waste disposal activities under subchapters I and II of this chapter, including—

(1) the identification, development, licensing, construction, operation, decommissioning, and post-decommissioning maintenance and monitoring of any repository, monitored,[2] retrievable storage facility[3] or test and evaluation facility constructed under this chapter;

(2) the conducting of nongeneric research, development, and demonstration activities under this chapter;

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[2] So in original. The comma probably should not appear.

[3] So in original. Probably should be followed by a comma.

(3) the administrative cost of the radioactive waste disposal program;

(4) any costs that may be incurred by the Secretary in connection with the transportation, treating, or packaging of spent nuclear fuel or high-level radioactive waste to be disposed of in a repository, to be stored in a monitored,[2] retrievable storage site[3] or to be used in a test and evaluation facility;

(5) the costs associated with acquisition, design, modification, replacement, operation, and construction of facilities at a repository site, a monitored,[2] retrievable storage site[3] or a test and evaluation facility site and necessary or incident to such repository, monitored,[2] retrievable storage facility[3] or test and evaluation facility; and

(6) the provision of assistance to States, units of general local government, and Indian tribes under sections 10136, 10138, and 10199 of this title.

No amount may be expended by the Secretary under this subchapter[4] for the construction or expansion of any facility unless such construction or expansion is expressly authorized by this or subsequent legislation. The Secretary hereby is authorized to construct one repository and one test and evaluation facility.

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[4] See References in Text note below.

(e) Administration of Waste Fund

(1) The Secretary of the Treasury shall hold the Waste Fund and, after consultation with the Secretary, annually report to the Congress on the financial condition and operations of the Waste Fund during the preceding fiscal year.

(2) The Secretary shall submit the budget of the Waste Fund to the Office of Management and Budget triennially along with the budget of the Department of Energy submitted at such time in accordance with chapter 11 of title 31. The budget of the Waste Fund shall consist of the estimates made by the Secretary of expenditures from the Waste Fund and other relevant financial matters for the succeeding 3 fiscal years, and shall be included in the Budget of the United States Government. The Secretary may make expenditures from the Waste Fund, subject to appropriations which shall remain available until expended. Appropriations shall be subject to triennial authorization.

(3) If the Secretary determines that the Waste Fund contains at any time amounts in excess of current needs, the Secretary may request the Secretary of the Treasury to invest such amounts, or any portion of such amounts as the Secretary determines to be appropriate, in obligations of the United States—

(A) having maturities determined by the Secretary of the Treasury to be appropriate to the needs of the Waste Fund; and

(B) bearing interest at rates determined to be appropriate by the Secretary of the Treasury, taking into consideration the current average

market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the maturities of such investments, except that the interest rate on such investments shall not exceed the average interest rate applicable to existing borrowings.

(4) Receipts, proceeds, and recoveries realized by the Secretary under this section, and expenditures of amounts from the Waste Fund, shall be exempt from annual apportionment under the provisions of subchapter II of chapter 15 of title 31.

(5) If at any time the moneys available in the Waste Fund are insufficient to enable the Secretary to discharge his responsibilities under this subchapter,[5] the Secretary shall issue to the Secretary of the Treasury obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be agreed to by the Secretary and the Secretary of the Treasury. The total of such obligations shall not exceed amounts provided in appropriation Acts. Redemption of such obligations shall be made by the Secretary from moneys available in the Waste Fund. Such obligations shall bear interest at a rate determined by the Secretary of the Treasury, which shall be not less than a rate determined by taking into consideration the average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of the obligations under

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[5] See References in Text note below.

this paragraph. The Secretary of the Treasury shall purchase any issued obligations, and for such purpose the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of title 31, and the purposes for which securities may be issued under such Act[5] are extended to include any purchase of such obligations. The Secretary of the Treasury may at any time sell any of the obligations acquired by him under this paragraph. All redemptions, purchases, and sales by the Secretary of the Treasury of obligations under this paragraph shall be treated as public debt transactions of the United States.

(6) Any appropriations made available to the Waste Fund for any purpose described in subsection (d) of this section shall be repaid into the general fund of the Treasury, together with interest from the date of availability of the appropriations until the date of repayment. Such interest shall be paid on the cumulative amount of appropriations available to the Waste Fund, less the average undisbursed cash balance in the Waste Fund account during the fiscal year involved. The rate of such interest shall be determined by the Secretary of the Treasury taking into consideration the average market yield during the month preceding each fiscal year on outstanding marketable obligations of the United States of comparable maturity. Interest payments may be deferred with the approval of the Secretary of the Treasury, but any interest payments so deferred shall themselves bear interest.

(Pub. L. 97-425, title III, §302, Jan. 7, 1983, 96 Stat. 2257.)

REFERENCES IN TEXT

Subsection (c) of this section, referred to in subsec. (a)(3), was in the original "subsection (c) 126(b)" and was translated as subsection (c) of this section as the probable intent of Congress in view of the establishment of the Nuclear Waste Fund by subsec. (c) of this section and the absence of a section 126 in Pub. L. 97-425.

This subchapter, referred to in subsecs. (a)(5)(B), (d), and (e)(5), was in the original "this subtitle", and was translated as this subchapter to reflect the probable intent of Congress because title III of Pub. L. 97-425, which enacted this subchapter, does not contain subtitles.

Such Act, referred to in subsec. (e)(5), probably means chapter 31 of Title 31, Money and Finance.

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions in subsec. (e)(1) of this subsection relating to annual report to Congress, see section 303 of Pub. L. 104-66, as amended, set out as a note under section 1113 of Title 31, Money and Finance, and the 4th item on page 143 of House Document No. 103-7.

42 U.S.C. § 10223. Alternative means of financing

The Secretary shall undertake a study with respect to alternative approaches to managing the construction and operation of all civilian radioactive waste management facilities, including the feasibility

of establishing a private corporation for such purposes. In conducting such study, the Secretary shall consult with the Director of the Office of Management and Budget, the Chairman of the Commission, and such other Federal agency representatives as may be appropriate. Such study shall be completed, and a report containing the results of such study shall be submitted to the Congress, within 1 year after January 7, 1983.

(Pub. L. 97-425, title II, §303, Jan. 7, 1983, 96 Stat. 2261.)

42 U.S.C. § 10224. Office of Civilian Radioactive Waste Management

(a) Establishment

There hereby is established within the Department of Energy an Office of Civilian Radioactive Waste Management. The Office shall be headed by a Director, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall be compensated at the rate payable for level IV of the Executive Schedule under section 5315 of title 5.

(b) Functions of Director

The Director of the Office shall be responsible for carrying out the functions of the Secretary under this chapter, subject to the general supervision of the Secretary. The Director of the Office shall be directly responsible to the Secretary.

(c) Annual report to Congress

The Director of the Office shall annually prepare and submit to the Congress a comprehensive report on the activities and expenditures of the Office.

(d) Audit by GAO

If requested by either House of the Congress (or any committee thereof) or if considered necessary by the Comptroller General, the Government Accountability Office shall conduct an audit of the Office, in accord with such regulations as the Comptroller General may prescribe. The Comptroller General shall have access to such books, records, accounts, and other materials of the Office as the Comptroller General determines to be necessary for the preparation of such audit. The Comptroller General shall submit a report on the results of each audit conducted under this section.

(Pub. L. 97-425, title III, §304, Jan. 7, 1983, 96 Stat. 2261; Pub. L. 104-66, title I, §1052(l), Dec. 21, 1995, 109 Stat. 719; Pub. L. 108-271, §8(b), July 7, 2004, 118 Stat. 814.)

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APPENDIX I

TITLE 10: ENERGY
CHAPTER III—DEPARTMENT OF ENERGY
SUBCHAPTER I—SALES REGULATION

PART 961—STANDARD CONTRACT FOR DISPOSAL OF SPENT NUCLEAR FUEL AND/OR HIGH-LEVEL RADIOACTIVE WASTE

Subpart A—General

Sec.

§ 961.1 Purpose.
§ 961.2 Applicability.
§ 961.3 Definitions.
§ 961.4 Deviations.
§ 961.5 Federal agencies.

Subpart B—Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste

§ 961.11 Text of the contract.

AUTHORITY: Sec. 644, Pub. L. 95–91, 91 Stat. 599 (42 U.S.C. 7254) and sec. 302, Pub. L. 97–425, 96 Stat. 2257 (42 U.S.C. 10222).

SOURCE: 48 FR 16599, Apr. 18, 1983, unless otherwise noted.

Subpart A—General

§ 961.1 Purpose.

This part establishes the contractual terms and conditions under which the Department of Energy (DOE) will make available nuclear waste disposal services to the owners and generators of spent nuclear fuel (SNF) and high-level radioactive waste (HLW) as provided in section 302 of the Nuclear Waste Policy Act of 1982 (Pub. L. 97–425). Under the contract set forth in §961.11 of this part, DOE will take title to, transport, and dispose of spent nuclear fuel and/or high-level radioactive waste delivered to DOE by those owners or generators of such fuel or waste who execute the contract. In addition, the contract will specify the fees owners and generators of SNF and/or HLW will pay for these services. All receipts, proceeds, and revenues realized by DOE under the contract will be deposited in the Nuclear Waste Fund, an account established by the Act in the U.S. Treasury. This fund will pay for DOE's radioactive waste disposal activities, the full costs of which will be borne by the owners and generators under contract with DOE for disposal services.

§ 961.2 Applicability.

This part applies to the Secretary of Energy or his designee and any person who owns or generates spent nuclear fuel or high-level radioactive waste, of domestic origin, generated in a civilian nuclear power reactor. If executed in a timely manner, the contract contained in this part will commit DOE to accept title to, transport, and dispose of such spent fuel and waste.

In exchange for these services, the owners or generators of such fuel or waste shall pay fees specified in the contract which are intended to recover fully the costs of the disposal services to be furnished by DOE. The contract must be signed by June 30, 1983, or by the date on which such owner or generator commences generation of, or takes title to, such spent fuel or waste, whichever occurs later.

§ 961.3 Definitions.

For purposes of this part—

Act means the Nuclear Waste Policy Act of 1982, Public Law 97–425, 96 Stat. 2201 *et seq.*, 42 U.S.C. 10101 *et seq.*

Contract means the agreement set forth in §961.11 of this part and any duly executed amendment or modification thereto.

Generator means any person who is licensed by the Nuclear Regulatory Commission to use a utilization or production facility under the authority of section 103 or 104 of the Atomic Energy Act of 1954 (42 U.S.C. 2133, 2134).

Owner means any person who has title to spent nuclear fuel or high-level radioactive waste.

Purchaser means any person, other than a Federal agency, who is licensed by the Nuclear Regulatory Commission to use a utilization or production facility under the authority of sections 103 or 104 of the Atomic Energy Act of 1954 (42 U.S.C. 2133, 2134) or

who has title to spent nuclear fuel or high level radioactive waste and who has executed a contract with DOE.

Secretary means the Secretary of Energy of his designee.

Other definitions relating to the subject matter of this rule are set forth in Article II of the contract which is contained in §961.11, Text of the contract, of this part.

§ 961.4 Deviations.

Requests for authority to deviate from this part shall be submitted in writing to the Contracting Officer, who shall forward the request for approval to the Senior Procurement Official, Headquarters. Each request for deviation shall contain the following information:

(a) A statement of the deviation desired, including identification of the specific paragraph number(s) of the contract;

(b) A description of the intended effect of the deviation;

(c) The reason why the deviation is considered necessary or would be in the best interests of the Government;

(d) The name of the owner or generator seeking the deviation and nuclear power reactor(s) affected;

(e) A statement as to whether the deviation has been requested previously and, if so, circumstances of the previous request;

(f) A statement of the period of time for which the deviation is needed; and

(g) Any pertinent background information will contribute to a full understanding of the desired deviation.

§ 961.5 Federal agencies.

Federal agencies or departments requiring DOE's disposal services for SNF and/or HLW will be accommodated by a suitable interagency agreement reflecting, as appropriate, the terms and conditions set forth in the contract in §961.11; *Provided, however,* that the fees to be paid by Federal agencies will be equivalent to the fees that would be paid under the contract.

Subpart B—Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste

§ 961.11 Text of the contract.

The text of the standard contract for disposal of spent nuclear fuel and/or high/level radioactive waste follows:

U.S. DEPARTMENT OF ENERGY CONTRACT NO.

___

Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste

THIS CONTRACT, entered into this _____ day of _____ 19___, by and between the UNITED STATES OF AMERICA (hereinafter referred to as the "Government"), represented by the UNITED STATES DEPARTMENT OF ENERGY (hereafter referred to as "DOE") and _____, (hereinafter referred to as the "Purchaser"), a corporation organized and existing under the laws of the State of _____ [add as applicable: "acting on behalf of itself and ___."].

Witnesseth that:

Whereas, the DOE has the responsibility for the disposal of spent nuclear fuel and high-level radioactive waste of domestic origin from civilian nuclear power reactors in order to protect the public health and safety, and the environment; and

Whereas, the DOE has the responsibility, following commencement of operation of a repository, to take title to the spent nuclear fuel or high-level radioactive waste involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent nuclear fuel; and

Whereas, all costs associated with the preparation, transportation, and the disposal of spent nuclear fuel and high-level radioactive waste from civilian nuclear

power reactors shall be borne by the owners and generators of such fuel and waste; and

Whereas, the DOE is required to collect a full cost recovery fee from owners and generators delivering to the DOE such spent nuclear fuel and/or high level radioactive waste; and

Whereas, the DOE is authorized to enter into contracts for the permanent disposal of spent nuclear fuel and/or high-level radioactive waste of domestic origin in DOE facilities; and

Whereas, the Purchaser desires to obtain disposal services from DOE; and

Whereas, DOE is obligated and willing to provide such disposal services, under the terms and conditions hereinafter set forth; and

Whereas, this contract is made and entered into under the authority of the DOE Organization Act (Pub. L. 95–91, 42 U.S.C. 7101 *et seq.*) and the Nuclear Waste Policy Act of 1982 (Pub. L. 97–425, 42 U.S.C. 10101 *et seq.*)

Now, therefore, the parties hereto do hereby agree as follows:

ARTICLE I—DEFINITIONS

As used throughout this contract, the following terms shall have the meanings set forth below:

1. The term *assigned three-month period* means the period that each Purchaser will be assigned by DOE, giving due consideration to the Purchaser's assignment preference, for purposes of reporting kilowatt hours generated by the Purchaser's nuclear power reactor and for establishing fees due and payable to DOE.

2. The term *cask* means a container for shipping spent nuclear fuel and/or high-level radioactive waste which meets all applicable regulatory requirements.

3. The term *civilian nuclear power reactor* means a civilian nuclear powerplant required to be licensed under sections 103 or 104(b) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2133, 2134(b)).

4. The term *Commission* means the United states Nuclear Regulatory Commission.

5. The term *contract* means this agreement and any duly executed amendment or modification thereto.

6. The term *Contracting Officer* means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly disignated Contracting Officer of the DOE; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

7. The term *delivery* means the transfer of custody, f.o.b. carrier, of spent nuclear fuel or high-level radioactive waste from Purchaser to DOE at the

Purchaser's civilian nuclear power reactor or such other domestic site as may be designated by the Purchaser and approved by DOE.

8. The term *disposal* means the emplacement in a repository of high-level radioactive waste, spent nuclear fuel, or other highly radioactive waste with no foreseeable intent of recovery, whether or not such emplacement permits recovery of such waste.

9. The term *DOE* means the United States Department of Energy or any duly authorized representative thereof, including the Contracting Officer.

10. The term *DOE facility* means a facility operated by or on behalf of DOE for the purpose of disposing of spent nuclear fuel and/or high-level radioactive waste, or such other facility(ies) to which spent nuclear fuel and/or high-level radioactive waste may be shipped by DOE prior to its transportation to a disposal facility.

11. The term *full cost recovery,* means the recoupment by DOE, through Purchaser fees and any interest earned, of all direct costs, indirect costs, and all allocable overhead, consistent with generally accepted accounting principles consistently applied, of providing disposal services and conducting activities authorized by the Nuclear Waste Policy Act of 1982 (Pub. L. 97–425). As used herein, the term *cost* includes the application of Nuclear Waste Fund moneys for those uses expressly set forth in section 302 (d) and (e) of the said Act and all other uses specified in the Act.

12. The term *high-level radioactive waste* (HLW) means—

(a) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentrations; and

(b) other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation.

13. The term *electricity (kilowatt hours) generated and sold* means gross electrical output produced by a civilian nuclear power reactor measured at the output terminals of the turbine generator minus the normal onsite nuclear station service loads during the time electricity is being generated multiplied by the total energy adjustment factor. For purposes of this provision, the following definition shall apply:

a. The term *Total Energy Adjustment Factor (TEAF)* means the sum of individual owners' weighted energy adjustment factors.

b. The term *Weighted Energy Adjustment Factor (WEAF)* means the product of an owner's energy adjustment factor times the owner's share of the plant.

c. The term *Owner's Energy Adjustment Factor (OEAF)* means the sum of the individual owner's adjustment for sales to ultimate consumers and adjustment for sales for resale.

d. The term *Owner's Share of the plant (OS)* means the owner's fraction of metered electricity sales, the owner's fraction of plant ownership, or the sponsor company's fixed entitlement percentage of the plant's output. This definition includes joint owners of

generating companies or participants in a generation and transmission cooperative.

e. The term *Adjustment for Sales to ultimate Consumer (ASC)* means the owner's fraction of sales to the ultimate consumer multiplied by the owner's sales to ultimate consumer adjustment factor.

f. The term *Fraction of Sales to ultimate Consumer (FSC)* means the owner's fractional quantity of electricity sold to the ultimate consumer relative to the total of electricity sales (sales to ultimate consumers plus the sales for resale).

g. The term *Sales to ultimate Consumer Adjustment Factor (SCAF)* means one minus the quotient of all electricity lost or otherwise not sold for each owner divided by the total electricity available for disposition to ultimate consumers. Electricity lost or otherwise not sold includes:

(1) Energy furnished without charge;

(2) Energy used by the company;

(3) Transmission losses;

(4) Distribution losses; and

(5) Other unaccounted losses as reported to the Federal Government "Annual Report of Major Electric Utilities, Licensees and Others," Federal Energy Regulatory Commission (FERC) Form No.1; Rural Electrification Administration (REA) Forms 7 and 11 if appropriate; or the "Annual Electric Utility Report," Energy Information Administration (EIA) Form EIA–861.

h. The term *Total Electricity Available for Disposition to Ultimate Consumers* means the reporting year's total of all of a utility's electricity supply which is available for disposition, expressed in kilowatt hours, and is equal to the sum of the energy

sources minus the electricity sold for resale by the utility.

i. The term *Adjustment for Sales for Resale (ASR)* means the owner's fraction of sales for resale multiplied by the national average adjustment factor.

j. The term *Fraction of Sales for Resale (FSR)* means the owner's fractional quantity of electricity sold for resale by the utility relative to the total of electricity sales.

k. The term *National Average Adjustment Factor (NAF)* means the ratio of the national total of electricity sold to the national total of electricity available for disposition, based on the most recent 3 years of national data provided to the Federal Government, and will be set by the Contracting Officer. This term will be evaluated annually and revised in increments of .005.

l. Pumped storage losses. If the proportion of nuclear generated electricity consumed by a pumped-storage hydro facility can be measured or estimated and if the electricity losses associated with pumped storage facilities can be documented (e.g. based on routine and uniform records of district power data on contributions from different electricity sources), a prorated nuclear share shall be allowed as an offset to gross electricity generation reported on the annex A of appendix G, NWPA–830G form. Specific methodologies for calculating these offsets must be approved by the Contracting Officer in advance.

Instructions to annex A of appendix G, NWPA–830G provide the necessary information to calculate the energy adjustment factors.

14. The term *metric tons uranium* means that measure of weight, equivalent to 2,204.6 pounds of

uranium and other fissile and fertile material that are loaded into a reactor core as fresh fuel.

15. The term *Purchaser's site* means the location of Purchaser's civilian nuclear power reactor or such other location as the Purchaser may designate.

16. The term *quarterly Treasury rate* means the current value of funds rate as specified by the Treasury Fiscal Requirements Manual, Volume 1, Part 6, section 8020.20. This rate is published quarterly in the FEDERAL REGISTER prior to the beginning of the affected quarter.

17. The term *shipping lot* means a specified quantity of spent nuclear fuel or high-level radioactive waste designated by Purchaser for delivery to DOE beginning on a specified date.

18. The term *spent nuclear fuel* (SNF) means fuel that has been withdrawn from a nuclear reactor following irradiation, the consistituent elements of which have not been separated by reprocessing.

19. The term *spent nuclear fuel and high-level radioactive waste of domestic origin* means irradiated fuel material used, and radioactive wastes resulting from such use, in nuclear power reactors located only in the United States.

20. The term *year* means the period which begins on October 1 and ends on September 30.

ARTICLE II—SCOPE

This contract applies to the delivery by Purchaser to DOE of SNF and/or HLW of domestic origin from civilian nuclear power reactors, acceptance of title by DOE to such SNF and/or HLW, subsequent transportation, and disposal of such SNF and/or HLW and, with respect to such material, establishes the fees to be paid by the Purchaser for the services to be rendered hereunder by DOE. The SNF and/or HLW shall be specified in a delivery commitment schedule as provided in Article V below. The services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all SNF and/or HLW from the civilian nuclear power reactors specified in appendix A, annexed hereto and made a part hereof, has been disposed of.

ARTICLE III—TERM

The term of this contract shall be from the date of execution until such time as DOE has accepted, transported from the Purchaser's site(s) and disposed of all SNF and/or HLW of domestic origin from the civilian nuclear power reactor(s) specified in appendix A.

ARTICLE IV—RESPONSIBILITIES OF THE PARTIES

A. Purchaser's Responsibilities

1. *Discharge Information.*

(a) On an annual basis, commencing October 1, 1983, the Purchaser shall provide DOE with

information on actual discharges to date and projected discharges for the next ten (10) years in the form and content set forth in appendix B, annexed hereto and made a part hereof. The information to be provided will include estimates and projections and will not be Purchaser's firm commitment with respect to discharges or deliveries.

(b) No later than October 1, 1983, the Purchaser shall provide DOE with specific information on:

(1) Total spent nuclear fuel inventory as of April 7, 1983;

(2) Total number of fuel assemblies removed from the particular reactor core prior to 12:00 a.m. April 7, 1983 for which there are plans for reinsertion in the core, indicating the current planned dates for reinsertion in the core. Estimates of the burned and unburned portion of each individual assembly are to be provided.

(c) In the event that the Purchaser fails to provide the annual forecast in the form and content required by DOE, DOE may, in its sole discretion, require a rescheduling of any delivery commitment schedule then in effect.

2. *Preparation for Transportation.*

(a) The Purchaser shall arrange for, and provide, all preparation, packaging, required inspections, and loading activities necessary for the transportation of SNF and/or HLW to the DOE facility. The Purchaser shall notify DOE of such activities sixty (60) days prior to the commencement of such activities. The preparatory activities by the Purchaser shall be made in accordance with all applicable laws and regulations relating to the Purchaser's responsibilities hereunder. DOE may designate a representative to observe the

preparatory activities conducted by the Purchaser at the Purchaser's site, and the Purchaser shall afford access to such representative.

(b) Except as otherwise agreed to by DOE, the Purchaser shall advise DOE, in writing as specified in appendix F, annexed hereto and made a part hereof, as to the description of the material in each shipping lot sixty (60) days prior to scheduled DOE transportation of that shipping lot.

(c) The Purchaser shall be responsible for incidental maintenance, protection and preservation of any and all shipping casks furnished to the Purchaser by DOE for the performance of this contract. The Purchaser shall be liable for any loss of or damage to such DOE-furnished property, and for expenses incidental to such loss or damage while such casks are in the possession and control of the Purchaser except as otherwise provided for hereunder. Routine cask maintenance, such as scheduled overhauls, shall not be the responsibility of the Purchaser.

B. DOE Responsibilities

1. DOE shall accept title to all SNF and/or HLW, of domestic origin, generated by the civilian nuclear power reactor(s) specified in appendix A, provide subsequent transportation for such material to the DOE facility, and dispose of such material in accordance with the terms of this contract.

2. DOE shall arrange for, and provide, a cask(s) and all necessary transportation of the SNF and/or HLW from the Purchaser's site to the DOE facility. Such cask(s) shall

be suitable for use at the Purchaser's site, meet applicable regulatory requirements, and be accompanied by pertinent information including, but not limited to, the following:

(a) Written procedures for cask handling and loading, including specifications on Purchaser-furnished cannisters for containment of failed fuel;

(b) Training for Purchaser's personnel in cask handling and loading, as may be necessary;

(c) Technical information, special tools, equipment, lifting trunnions, spare parts and consumables needed to use and perform incidental maintenance on the cask(s); and

(d) Sufficient documentation on the equipment supplied by DOE.

3. DOE may fulfill any of its obligations, or take any action, under this contract either directly or through contractors.

4. DOE shall annually provide to the Purchaser pertinent information on the waste disposal program including information on cost projections, project plans and progress reports.

5. (a) Beginning on April 1, 1991, DOE shall issue an annual acceptance priority ranking for receipt of SNF and/or HLW at the DOE repository. This priority ranking shall be based on the age of SNF and/or HLW as calculated from the date of discharge of such material from the civilian nuclear power reactor. The oldest fuel or waste will have the highest priority for acceptance, except as provided in paragraphs B and D of Article V and paragraph B.3 of Article VI hereof.

(b) Beginning not later than July 1, 1987, DOE shall issue an annual capacity report for planning purposes. This report shall set forth the projected annual receiving capacity for the DOE facility(ies) and the annual acceptance ranking relating to DOE contracts for the disposal of SNF and/or HLW including, to the extent available, capacity information for ten (10) years following the projected commencement of operation of the initial DOE facility.

ARTICLE V—DELIVERY OF SNF AND/OR HLW

A. Description of SNF and HLW

The Purchaser shall deliver to DOE and DOE shall, as provided in this contract, accept the SNF and/or HLW which is described in accordance with Article VI.A. of this contract, for disposal thereof.

B. Delivery Commitment Schedule

1. Delivery commitment schedule(s), in the form set forth in appendix C annexed hereto and made a part hereof, for delivery of SNF and/or HLW shall be furnished to DOE by Purchaser. After DOE has issued its proposed acceptance priority ranking, as described in paragraph B.5 of Article IV hereof, beginning January 1, 1992 the Purchaser shall submit to DOE the delivery commitment schedule(s) which shall identify all SNF and/or HLW the Purchaser wishes to deliver to DOE beginning sixty-three (63) months thereafter. DOE shall approve or disapprove such schedules within three (3) months after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and

request a revised schedule from the Purchaser, to be submitted to DOE within thirty (30) days after receipt of DOE's notice of disapproval.

2. DOE shall approve or disapprove such revised schedule(s) within sixty (60) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and shall submit its proposed schedule(s). If these are not acceptable to the Purchaser, the parties shall promptly seek to negotiate mutually acceptable schedule(s). Purchaser shall have the right to adjust the quantities of SNF and/or HLW plus or minus (±) twenty percent (20%), and the delivery schedule up to two (2) months, until the submission of the final delivery schedule.

C. Final Delivery Schedule

Final delivery schedule(s), in the form set forth in appendix D, annexed hereto and made a part hereof, for delivery of SNF and/or HLW covered by an approved delivery commitment schedule(s) shall be furnished to DOE by Purchaser. The Purchaser shall submit to DOE final delivery schedules not less than twelve (12) months prior to the delivery date specified therein. DOE shall approve or disapprove a final delivery schedule within forty-five (45) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and shall request a revised schedule from the Purchaser, to be submitted to DOE within thirty (30) days after receipt of DOE's notice of disapproval. DOE shall approve or disapprove such revised schedule(s) within sixty (60) days after receipt. In the event of disapproval, DOE shall advise the Purchaser

in writing of the reasons for such disapproval and shall submit its proposed schedule(s). If these are not acceptable to the Purchaser, the parties shall promptly seek to negotiate mutually acceptable schedule(s).

D. Emergency Deliveries

Emergency deliveries of SNF and/or HLW may be accepted by DOE before the date provided in the delivery commitment schedule upon prior written approval by DOE.

E. Exchanges

Purchaser shall have the right to determine which SNF and/or HLW is delivered to DOE; *provided, however,* that Purchaser shall comply with the requirements of this contract. Purchaser shall have the right to exchange approved delivery commitment schedules with parties to other contracts with DOE for disposal of SNF and/or HLW; *provided, however,* that DOE shall, in advance, have the right to approve or disapprove, in its sole discretion, any such exchanges. Not less than six (6) months prior to the delivery date specified in the Purchaser's approved delivery commitment schedule, the Purchaser shall submit to DOE an exchange request, which states the priority rankings of both the Purchaser hereunder and any other Purchaser with whom the exchange of approved delivery commitment schedules is proposed. DOE shall approve or disapprove the proposed exchange within thirty (30) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval.

ARTICLE VI—CRITERIA FOR DISPOSAL

A. General Requirements

1. *Criteria.*

(a) Except as otherwise provided in this contract, DOE shall accept hereunder only such SNF and/or HLW which meets the General Specifications for such fuel and waste as set forth in appendix E, annexed hereto and made a part hereof.

(b) Purchaser shall accurately classify SNF and/or HLW prior to delivery in accordance with paragraphs B and D of appendix E.

2. *Procedures.*

(a) Purchaser shall provide to DOE a detailed description of the SNF and/or HLW to be delivered hereunder in the form and content as set forth in appendix F, annexed hereto and made a part hereof. Purchaser shall promptly advise DOE of nay changes in said SNF and/or HLW as soon as they become known to the purchaser.

(b) DOE's obligation for disposing of SNF under this contract also extends to other than standard fuel; however, for any SNF which has been designated by the Purchaser as other than standard fuel, as that term is defined in appendix E, the Purchaser shall obtain delivery and procedure confirmation from DOE prior to delivery. DOE shall advise Purchaser within sixty (60) days after receipt of such confirmation request as to the technical feasibility of disposing of such fuel on the currently agreed to schedule and any schedule adjustment for such services.

B. Acceptance Procedures

1. *Acceptance Priority Ranking.*

Delivery commitment schedules for SNF and/or HLW may require the disposal or more material than the annual capacity of the DOE disposal facility (or facilities) can accommodate. The following acceptance priority ranking will be utilized:

(a) Except as may be provided for in subparagraph (b) below and Article V.D. of this contract, acceptance priority shall be based upon the age of the SNF and/or HLW as calculated from the date of discharge of such material from the civilian nuclear power reactor. DOE will first accept from Purchaser the oldest SNF and/or HLW for disposal in the DOE facility, except as otherwise provided for in paragraphs B and D of Article V.

(b) Notwithstanding the age of the SNF and/or HLW, priority may be accorded any SNF and/or HLW removed from a civilian nuclear power reactor that has reached the end of its useful life or has been shut down permanently for whatever reason.

2. *Verification of SNF and/or HLW.*

During cask loading and prior to acceptance by DOE for transportation to the DOE facility, the SNF and/or HLW description of the shipping lot shall be subject to verification by DOE. To the extent the SNF and/or HLW is consistent with the description submitted and approved, in accordance with appendices E and F, DOE agrees to accept such SNF and/or HLW for disposal when DOE has verified the SNF and/or HLW description, determined the material is properly loaded, packaged, marked, labeled and ready for transportation, and has taken custody, as

evidenced in writing, of the material at the Purchaser's site, f.o.b. carrier. A properly executed off-site radioactive shipment record describing cask contents must be prepared by the Purchaser along with a signed certification which states: "This is to certify that the above-named materials are properly described, classified, packaged, marked and labeled and are in proper condition for transfer according to the applicable regulations of the U. S. Department of Transportation."

3. *Improperly described SNF and/or HLW.*

(a) *Prior to Acceptance*— If SNF and/or HLW is determined by DOE to be improperly described prior to acceptance by DOE at the Purchaser's site, DOE shall promptly notify the Purchaser in writing of such determination. DOE reserves the right, in its sole discretion, to refuse to accept such SNF and/or HLW until the SNF and/or HLW has been properly described. The Purchaser shall not transfer such SNF and/or HLW to DOE unless DOE agrees to accept such SNF and/or HLW under such other arrangements as may be agreed to, in writing, by the parties.

(b) *After Acceptance*— If subsequent to its acceptance DOE finds that such SNF and/or HLW is improperly described, DOE shall promptly notify the Purchaser, in writing, of such finding. In the event of such notification, Purchaser shall provide DOE with a proper designation within thirty (30) days. In the event of a failure by the Purchaser to provide such proper designation, DOE may hold in abeyance any and all deliveries scheduled hereunder.

ARTICLE VII—TITLE

Title to all SNF and/or HLW accepted by DOE for disposal shall pass to DOE at the Purchaser's site as provided for in Article VI hereof. DOE shall be solely repsonsible for control of all material upon passage of title. DOE shall have the right to dispose as it sees fit of any SNF and/or HLW to which it has taken title. The Purchaser shall have no claim against DOE or the Government with respect to such SNF or HLW nor shall DOE or the Government be obligated to compensate the Purchaser for such material.

ARTICLE VIII—FEES AND TERMS OF PAYMENT

A. Fees

1. Effective April 7, 1983, Purchaser shall be charged a fee in the amount of 1.0 mill per kilowatt hour (1M/kWh) electricity generated and sold.

2. For SNF, or solidified high-level radioactive waste derived from SNF, which fuel was used to generate electricity in a civilian nuclear power reactor prior to April 7, 1983, a one-time fee will be assessed by applying industry-wide average dollar per kilogram charges to four (4) distinct ranges of fuel burnup so that the integrated cost across all discharged (i.e. spent) fuel is equivalent to an industry-wide average charge of 1.0 mill per kilowatt-hour. For purposes of this contract, discharged nuclear fuel is that fuel removed from the reactor core with no plans for reinsertion. In the event that any such fuel withdrawn with plans for reinsertion is not reinserted, then the applicable fee for such fuel shall be calculated as set

forth in this paragraph 2. The categories of spent nuclear fuel burnup and the fee schedule are listed below:

[In 1982 dollars]

Nuclear spent fuel burnup range	Dollars per kilogram
0 to 5,000 MWDT/MTU	$80.00
5,000 to 10,000 MWDT/MTU	142.00
10,000 to 20,000 MWDT/MTU	162.00
Over 20,000 MWDT/MTU	184.00

This fee shall not be subject to adjustment, and the payment thereof by the Purchaser shall be made to DOE as specified in paragraph B of this Article VIII.

3. For in-core fuel as of April 7, 1983, that portion of the fuel burned through April 6, 1983 shall be subject to the one-time fee as calculated in accordance with the following methodology: [a] determine the total weight in kilograms of unranium loaded initially in the particular core; [b] determine the total megawatt-days (thermal) which have been generated by all of the fuel assemblies in the said core as of 12:00 A.M. April 7, 1983; [c] divide the megawatt-days (thermal) generated in the said core by the total metric tons of initially loaded uranium in that core and multiply the quotient by the conversion factor 0.0078 to obtain a value in dollars per kilogram; and [d] multiply the

dollars per kilogram value by the kilograms determined in [a] above to derive the dollar charge for the one-time fee to be paid for the specified in-core fuel as of 12:00 A.M. April 7, 1983. For purposes of this contract, in-core fuel is that fuel in the reactor core as of the date specified, plus any fuel removed from the reactor with plans for reinsertion. That portion of such fuel unburned as of 12:00 A.M. April 7, 1983 shall be subject to the 1.0 mill per kilowatt-hour charge.

4. DOE will annually review the adequacy of the fees and adjust the 1M/KWH fee, if necessary, in order to assure full cost recovery by the Government. Any proposed adjustment to the said fee will be transmitted to Congress and shall be effective after a period of ninety (90) days of continuous session has elapsed following receipt of such transmittal unless either House of Congress adopts a resolution disapproving the proposed adjustment. Any adjustment to the 1M/KWH fee under paragraph A.1. of this Article VIII shall be prospective.

B. Payment

1. For electricity generated and sold by the Purchaser's civilian nuclear power reactor(s) on or after April 7, 1983, fees shall be paid quarterly by the Purchaser and must be received by DOE not later than the close of the last business day of the month following the end of each assigned 3-month period. The first payment shall be due on July 31, 1983, for the period April 7, 1983, to June 30, 1983. (Add as applicable: A one-time adjustment period payment shall be due on _____, for the period _____ to _____.) The assigned 3-month period, for purposes of payment

and reporting of electricity generated and sold shall begin _____.

2. For SNF discharged prior to April 7, 1983, and for in-core burned fuel as of 12:00 A.M. April 7, 1983, the Purchaser shall, within two (2) years of contract execution, select one of the following fee payment options:

(a) *Option 1*— The Purchaser's financial obligation for said fuel shall be prorated evenly over forty (40) quarters and will consist of the fee plus interest on the outstanding fee balance. The interest from April 7, 1983, to date of the first payment is to be calculated based upon the 13-week Treasury bill rate, as reported on the first such issuance following April 7, 1983, and compounded quarterly thereafter by the 13-week Treasury bill rates as reported on the first such issuance of each succeeding assigned three-month period. Beginning with the first payment, interest is to be calculated on Purchaser's financial obligation plus accrued interest, at the ten-year Treasury note rate in effect on the date of the first payment. In no event shall the end of the forty (40) quarters extend beyond the first scheduled delivery date as reflected in the DOE-approved delivery commitment schedule. All payments shall be made concurrently with the assigned three month period payments. At any time prior to the end of the forty (40) quarters, Purchaser may, without penalty, make a full or partial lump sum payment at any of the assigned three month period payment dates. Subsequent quarterly payments will be appropriately reduced to reflect the reduction in the remaining balance in the fee due and payable. The remaining financial obligation, if any, will be subject

to interest at the same ten-year Treasury note rate over the remainder of the ten year period.

(b) *Option 2*— The Purchaser's financial obligation shall be paid in the form of a single payment anytime prior to the first delivery, as reflected in the DOE approved delivery commitment schedule, and shall consist of the fee plus interest on the outstanding fee balance. Interest is to be calculated from April 7, 1983, to the date of the payment based upon the 13-week Treasury bill rate, as reported on the first such issuance following April 7, 1983, and compounded quarterly thereafter by the 13-week Treasury bill rates as reported on the first such issuance of each succeeding assigned three-month period until payment.

(c) *Option 3*— The Purchaser's financial obligation shall be paid prior to June 30, 1985, or prior to two (2) years after contract execution, whichever comes later, in the form of a single payment and shall consist of all outstanding fees for SNF and in-core fuel burned prior to April 7, 1983. Under this option, no interest shall be due to DOE from April 7, 1983, to the date of full payment on the outstanding fee balance.

3. Method of Payment:

(a) Payments shall be made by wire transfer, in accordance with instructions specified by DOE in appendix G attached hereto and made a part hereof, and must be received within the time periods specified in paragraph B.1. of this Article VIII.

(b) The Purchaser will complete a Standard Remittance Advice, as set forth in appendix G, for each assigned three month period payment, and mail it postmarked no later than the last business day of the month following each assigned three month period to

Department of Energy, Office of Controller, Cash Management Division, Box 500, Room D–208, Germantown, Maryland 20874.

4. Any fees not paid on a timely basis or underpaid because of miscalculation will be subject to interest as specified in paragraph C of this Article VIII.

C. Interest on Late Fees

1. DOE will notify the Purchaser of amounts due only when unpaid or underpaid by the dates specified in paragraph B above. Interest will be levied according to the following formula:

Interest=Unpaid balance due to DOE for assigned three month period × Quarterly Treasury rate plus six percent (6%) × Number of months late including month of payment (fractions rounded up to whole months) ÷ 12

2. Interest is payable at any time prior to the due date for the subsequent assigned three month period fee payment. Nonpayment by the end of the subsequent assigned three month period will result in compounding of interest due. Purchaser shall complete a Standard Remittance Advice of interest payments.

3. Following the assessment of a late fee by DOE, payments will be applied against accrued interest first and the principal thereafter.

D. Effect of Payment

Upon payment of all applicable fees, interest and penalties on upaid or underpaid amounts, the Purchaser shall have no further financial obligation to DOE for the disposal of the accepted SNF and/or HLW.

E. Audit

1. The DOE or its representative shall have the right to perform any audits or inspections necessary to determine whether Purchaser is paying the correct amount under the fee schedule and interest provisions set forth in paragraphs A, B and C above.

2. Nothing in this contract shall be deemed to preclude an audit by the General Accounting Office of any transaction under this contract.

3. The Purchaser shall furnish DOE with such records, reports and data as may be necessary for the determination of quantities delivered hereunder and for final settlement of amounts due under this contract and shall retain and make available to DOE and its authorized representative examination at all reasonable times such records, reports and data for a period of three (3) years from the completion of delivery of all material under this contract.

ARTICLE IX—DELAYS

A. Unavoidable Delays by Purchaser or DOE

Neither the Government nor the Purchaser shall be liable under this contract for damages caused by

failure to perform its obligations hereunder, if such failure arises out of causes beyond the control and without the fault or negligence of the party failing to perform. In the event circumstances beyond the reasonable control of the Purchaser or DOE—such as acts of God, or of the public enemy, acts of Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather—cause delay in scheduled delivery, acceptance or transport of SNF and/or HLW, the party experiencing the delay will notify the other party as soon as possible after such delay is ascertained and the parties will readjust their schedules, as appropriate, to accommodate such delay.

B. Avoidable Delays by Purchaser or DOE

In the event of any delay in the delivery, acceptance or transport of SNF and/or HLW to or by DOE caused by circumstances within the reasonable control of either the Purchaser or DOE or their respective contractors or suppliers, the charges and schedules specified by this contract will be equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay.

ARTICLE X—SUSPENSION

A. In addition to any other rights DOE may have hereunder, DOE reserves the right, at no cost to the Government, to suspend this contract or any portion thereof upon written notice to the Purchaser within ninety (90) days of the Purchaser's failure to perform its obligations hereunder, and the Purchaser's failure

to take corrective action within thirty (30) days after written notice of such failure to perform as provided above, unless such failure shall arise from causes beyond the control and without the fault or negligence of the Purchaser, its contractors or agents. However, the Purchaser's obligation to pay fees required hereunder shall continue unaffected by any suspension. Any such suspension shall be rescinded if and when DOE determines that Purchaser has completed corrective action.

B. The DOE reserves the right to suspend any scheduled deliveries in the event that a national emergency requires that priority be given to Government programs to the exclusion of the work under this contract. In the event of such a suspension by the Government, the DOE shall refund that portion of payments representing services not delivered as determined by the Contracting Officer to be an equitable adjustment. Any disagreement arising from the refund payment, if any, shall be resolved as provided in the clause of this contract, entitled "DISPUTES."

ARTICLE XI—REMEDIES

Nothing in this contract shall be construed to preclude either party from asserting its rights and remedies under the contract or at law.

ARTICLE XII—NOTICES

All notices and communications between the parties under this contract (except notices published in

the FEDERAL REGISTER) shall be in writing and shall be sent to the following addressees:

To DOE: _____

_____

_____

To the Purchaser: _____

_____

_____

However, the parties may change the addresses or addressees for such notices or communications without formal modification to this contract; *provided, however,* that notice of such changes shall be given by registered mail.

ARTICLE XIII—REPRESENTATION CONCERNING NUCLEAR HAZARDS INDEMNITY

A. DOE represents that it will include in its contract(s) for the operation of any DOE facility an indemnity agreement based upon Section 170(d) of the Atomic Energy Act of 1954, as amended, a copy of which agreement shall be furnished to the Purchaser; that under said agreement, DOE shall have agreed to indemnify the contractor and other persons indemnified against claims for public liability (as defined in said Act) arising out of or in connection with contractual activities; that the indemnity shall apply to covered nuclear incidents which (1) take place at a contract location; or (2) arise out of or in the course of transportation of source, special nuclear or by-product material to or from a contract location. The obligation

of DOE to indemnify shall be subject to the conditions stated in the indemnity agreement.

B. The provisions of this Article XIII shall continue beyond the term of this contract.

ARTICLE XIV—ASSIGNMENT

The rights and duties of the Purchaser may be assignable with transfer of title to the SNF and/or HLW involved; *provided, however,* that notice of any such transfer shall be made to DOE within ninety (90) days of transfer.

ARTICLE XV—AMENDMENTS

The provisions of this contract has been developed in the light of uncertainties necessarily attendant upon long-term contracts. Accordingly, at the request of either DOE or Purchaser, the parties will negotiate and, to the extent mutually agreed, amend this contract as the parties may deem to be necessary or proper to reflect their respective interests; *provided, however,* that any such amendment shall be consistent with the DOE final rule published in the FEDERAL REGISTER on April 18, 1983 entitled, "Standard Contract for Disposal or SNF and/or HLW", as the same may be amended from time to time.

ARTICLE XVI—DISPUTES

A. Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall

reduce his decision to writing and mail or otherwise furnish a copy thereof to the Purchaser. The decision of the Contracting Officer shall be final and conclusive unless within ninety (90) days from the date of receipt of such copy, the Purchaser mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the DOE Board of Contract Appeals (Board). The decision of the Board shall be final and conclusive unless determined by a court of competent jursidiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Purchaser shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

B. For Purchaser claims of more than $50,000, the Purchaser shall submit with the claim a certification that the claim is made in good faith; the supporting data are accurate and complete to the best of the Purchaser's knowledge and belief; and the amount requested accurately reflects the contract adjustment for which the Purchaser believes the Government is liable. The certification shall be executed by the Purchaser if an individual. When the Purchaser is not an individual, the certification shall be executed by a senior company official in charge at the Purchaser's plant or location involved, or by an officer or general partner of the Purchaser having overall responsibility for the conduct of the Purchaser's affairs.

C. For Purchaser claims of $50,000 or less, the Contracting Officer must render a decision within sixty (60) days. For Purchaser claims in excess of

$50,000, the Contracting Officer must decide the claim within sixty (60) days or notify the Purchaser of the date when the decision will be made.

D. This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph A above; *provided, however,* that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

ARTICLE XVII—OFFICIALS NOT TO BENEFIT

No member of or delegate to Congress or resident commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ARTICLE XVIII—COVENANT AGAINST CONTINGENT FEES

The Purchaser warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Purchaser for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or in its discretion to increase the contract price or

consideration, or otherwise recover, the full amount of such commission, brokerage, or contingent fee.

ARTICLE XIX—EXAMINATION OF RECORDS

The Purchaser agrees that the Comptroller General of the United States or any of his duly authorized representatives shall have access to and the right to examine any directly pertinent books, documents, papers and records of the Purchaser involving transactions related to this contract until the expiration of three years after final payment under this contract.

ARTICLE XX—PERMITS

The Government and the Purchaser shall procure all necessary permits or licenses (including any special nuclear material licenses) and comply with all applicable laws and regulations of the United States, States and municipalities necessary to execute their respective responsibilities and obligations under this contract.

ARTICLE XXI—RIGHTS IN TECHNICAL DATA

A. Definitions.

1. *Technical data* means recorded information regardless of form or characteristic, of a specific or technical nature. It may, for example, document research, experimental, developmental, or demonstration, or engineering work, or be usable or used to define a design or process, or to procure, produce, support, maintain or operate material. The

data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design-type documents or computer software (including computer programs, computer software data bases, and computer software documentation). Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical data as used herein do not include financial reports, cost analyses, and other information incidental to contract administration.

2. *Proprietary data* means technical data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:

(a) Are not generally known or available from other sources without obligation concerning their confidentiality;

(b) Have not been made available by the owner to others without obligation concerning its confidentiality; and

(c) Are not already available to the Government without obligation concerning their confidentiality.

3. *Contract data* means technical data first produced in the performance of the contract, technical data which are specified to be delivered under the contract, or technical data actually delivered in connection with the contract.

4. *Unlimited rights* means rights to use, duplicate, or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

B. Allocation of Rights.

1. The Government shall have:

(a) Unlimited rights in contract data except as otherwise provided below with respect to proprietary data properly marked as authorized by this clause;

(b) The right to remove, cancel, correct or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder, if in response to a written inquiry by DOE concerning the proprietary nature of the markings, the Purchaser fails to respond thereto within 60 days or fails to substantiate the proprietary nature of the markings. In either case, DOE will notify the Purchaser of the action taken;

(c) No rights under this contract in any technical data which are not contract data.

2. Subject to the foregoing provisions of this rights in technical data clause, the Purchaser shall have the right to mark proprietary data it furnishes under the contract with the following legend and no other, the terms of which shall be binding on the Government:

LIMITED RIGHTS LEGEND

This "proprietary data," furnished under "Contract No. ___" with the U.S. Department of Energy may be duplicated and used by the Government with the express limitations that the "proprietary data" may

not be disclosed outside the Government or be used for purposes of manufacture without prior permission of the Purchaser, except that further disclosure or use may be made solely for the following purposes:

(a) This "proprietary data" may be disclosed for evaluation purposes under the restriction that the "proprietary data" be retained in confidence and not be further disclosed;

(b) This "proprietary data" may be disclosed to contractors participating in the Government's program of which this contract is a part, for information or use in connection with the work performed under their contracts and under the restriction that the "proprietary data" be retained in confidence and not be further disclosed; or

(c) This "proprietary data" may be used by the Government or others on its behalf for emergency work under the restriction that the "proprietary data" be retained in confidence and not be further disclosed. This legend shall be marked on any reproduction of this data in whole or in part.

3. In the event that proprietary data of a third party, with respect to which the Purchaser is subject to restrictions on use or disclosure, is furnished with the Limited Rights Legend above, Purchaser shall secure the agreement of such third party to the rights of the Government as set forth in the Limited Rights Legend. DOE shall upon request furnish the names of those contractors to which proprietary data has been disclosed.

ARTICLE XXII—ENTIRE CONTRACT

A. This contract, which consists of Articles I through XXII and appendices A through G, annexed hereto and made a part hereof, contains the entire agreement between the parties with respect to the subject matter hereof. Any representation, promise, or condition not incorporated in this contract shall not be binding on either party. No course of dealing or usage of trade or course of performance shall be relevant to explain or supplement any provision contained in this contract.

B. Nothing in this contract is intended to affect in any way the contractual obligation of any other persons with whom the Purchaser may have contracted with respect to assuming some or all disposal costs or to accept title to SNF and/or HLW.

* * *

APPENDIX J

MICHIGAN PUBLIC SERVICE COMMISSION

Act 3 of 1939

AN ACT to provide for the regulation and control of public and certain private utilities and other services affected with a public interest within this state; to provide for alternative energy suppliers; to provide for licensing; to include municipally owned utilities and other providers of energy under certain provisions of this act; to create a public service commission and to prescribe and define its powers and duties; to abolish the Michigan public utilities commission and to confer the powers and duties vested by law on the public service commission; to provide for the continuance, transfer, and completion of certain matters and proceedings; to abolish automatic adjustment clauses; to prohibit certain rate increases without notice and hearing; to qualify residential energy conservation programs permitted under state law for certain federal exemption; to create a fund; to provide for a restructuring of the manner in which energy is provided in this state; to encourage the utilization of resource recovery facilities; to prohibit certain acts and practices of providers of energy; to allow for the securitization of stranded costs; to reduce rates; to provide for appeals; to provide appropriations; to declare the effect and purpose of this act; to prescribe remedies and penalties; and to repeal acts and parts of acts.

MICHIGAN PUBLIC SERVICE COMMISSION (EXCERPT) Act 3 of 1939

460.6 Public service commission; power and jurisdiction; "private, investor-owned wastewater utilities" defined.

Sec. 6. (1) The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state except a municipally owned utility, the owner of a renewable resource power production facility as provided in section 6d, and except as otherwise restricted by law. The public service commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities. The public service commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of public utilities, including electric light and power companies, whether private, corporate, or cooperative; water, telegraph, oil, gas, and pipeline companies; motor carriers; private wastewater treatment facilities; and all public transportation and communication agencies other than railroads and railroad companies.

(2) A private, investor-owned wastewater utility may apply to the commission for rate regulation. If an application is filed under this subsection, the commission is vested with the specific grant of jurisdictional authority to regulate the rates, fares,

fees, and charges of private, investor-owned wastewater utilities. As used in this subsection, "private, investor-owned wastewater utilities" means a utility that delivers wastewater treatment services through a sewage system and the physical assets of which are wholly owned by an individual or group of individual shareholders.

460.6a Gas or electric utility; petition or application to increase rates and charges or to amend rate or rate schedules; notice and hearing; finding and order granting partial and immediate relief; investigation and report; increase in rates based upon changes in cost of fuel or purchased gas; automatic fuel or purchased gas adjustment clause; rules and procedures; adjustment clauses operating without notice and hearing abolished; separate hearing to determine cost of fuel, purchased gas, or purchased power; recovery of cost; "full and complete hearing" and "general rate case" defined; final decision; reports.

Sec. 6a. (1) When a finding or order is sought by a gas or electric utility to increase its rates and charges or to alter, change, or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, notice shall be given within the service area to be affected. The utility shall place in evidence facts relied upon to support the utility's petition or application to increase its rates and charges, or to alter, change, or amend any rate or rate schedules. After first having given notice to the interested parties within the service area to be affected and affording interested parties a reasonable

opportunity for a full and complete hearing, the commission, after submission of all proofs by any interested party, may in its discretion and upon written motion by the utility make a finding and enter an order granting partial and immediate relief. A finding or order shall not be authorized or approved ex parte, nor until the commission's technical staff has made an investigation and report. An alteration or amendment in rates or rate schedules applied for by a public utility that will not result in an increase in the cost of service to its customers may be authorized and approved without notice or hearing. There shall be no increase in rates based upon changes in cost of fuel or purchased gas unless notice has been given within the service area to be affected, and there has been an opportunity for a full and complete hearing on the cost of fuel or purchased gas. The rates charged by any utility pursuant to an automatic fuel or purchased gas adjustment clause shall not be altered, changed, or amended unless notice has been given within the service area to be affected, and there has been an opportunity for a full and complete hearing on the cost of the fuel or purchased gas.

(2) The commission shall adopt rules and procedures for the filing, investigation, and hearing of petitions or applications to increase or decrease utility rates and charges as the commission finds necessary or appropriate to enable it to reach a final decision with respect to petitions or applications within a period of 9 months from the filing of the petitions or applications. The commission shall not authorize or approve adjustment clauses that operate without notice and an opportunity for a full and complete hearing, and all such clauses shall be abolished. The

commission may hold a full and complete hearing to determine the cost of fuel, purchased gas, or purchased power separately from a full and complete hearing on general rate case and may be held concurrently with the general rate case. The commission shall authorize a utility to recover the cost of fuel, purchased gas, or purchased power only to the extent that the purchases are reasonable and prudent. As used in this section:

(a) "Full and complete hearing" means a hearing that provides interested parties a reasonable opportunity to present and cross-examine evidence and present arguments relevant to the specific element or elements of the request that are the subject of the hearing.

(b) "General rate case" means a proceeding initiated by a utility in an application filed with the commission that alleges a revenue deficiency and requests an increase in the schedule of rates or charges based on the utility's total cost of providing service.

(3) If a final decision has not been reached upon a petition or application to increase or decrease utility rates within the 9-month period required by subsection (2), the commission shall give priority to the case and shall take such other action as it finds necessary or appropriate to expedite a final decision. If the commission fails to reach a final decision with respect to a petition or application to increase or decrease utility rates within the 9-month period following the filing of the petition or application, the commission, within 15 days after expiration of the 9-month period, shall submit a written report to the governor and to the president of the senate and the speaker of the house of representatives stating the reasons a decision

was not reached within the 9-month period and the actions being taken to expedite the decision. The commission shall submit a further report upon reaching a final decision providing full details with respect to the conduct of the case, including the time required for issuance of the commission's decision following the conclusion of hearings.

460.6j Incorporation of power supply cost recovery clause in electric rates or rate schedule of utility; definitions; order and hearing; filing power supply cost recovery plan and 5-year forecast; power supply and cost review; final or temporary order; incorporating power supply cost recovery factors in rates; filing revised power supply cost recovery plan; reopening power supply and cost review; monthly statement of revenues; power supply cost reconciliation; commission order; refunds or credits or additional charges to customers; apportionment; interest; exemption; setting power supply cost recovery factors in general rate case order.

Sec. 6j. (1) As used in this act:

(a) "Power supply cost recovery clause" means a clause in the electric rates or rate schedule of a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices.

(b) "Power supply cost recovery factor" means that element of the rates to be charged for electric service to reflect power supply costs incurred by an electric utility and made pursuant to a power supply cost recovery clause incorporated in the rates or rate schedule of an electric utility.

(2) Pursuant to its authority under this act, the public service commission may incorporate a power supply cost recovery clause in the electric rates or rate schedule of a utility, but is not required to do so. Any order incorporating a power supply cost recovery clause shall be as a result of a hearing solely on the question of the inclusion of the clause in the rates or rate schedule, which hearing shall be conducted as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.271 to 24.287 of the Michigan Compiled Laws, or, pursuant to subsection (18), as a result of a general rate case. Any order incorporating a power supply cost recovery clause shall replace and rescind any previous fuel cost adjustment clause or purchased and net interchanged power adjustment clause incorporated in the electric rates of the utility upon the effective date of the first power supply cost recovery factor authorized for the utility under its power supply cost recovery clause.

(3) In order to implement the power supply cost recovery clause established pursuant to subsection (2), a utility annually shall file, pursuant to procedures established by the commission, if any, a complete power supply cost recovery plan describing the expected sources of electric power supply and changes in the cost of power supply anticipated over a future

12-month period specified by the commission and requesting for each of those 12 months a specific power supply cost recovery factor. The plan shall be filed not less than 3 months before the beginning of the 12-month period covered by the plan. The plan shall describe all major contracts and power supply arrangements entered into by the utility for providing power supply during the specified 12-month period. The description of the major contracts and arrangements shall include the price of fuel, the duration of the contract or arrangement, and an explanation or description of any other term or provision as required by the commission. The plan shall also include the utility's evaluation of the reasonableness and prudence of its decisions to provide power supply in the manner described in the plan, in light of its existing sources of electrical generation, and an explanation of the actions taken by the utility to minimize the cost of fuel to the utility.

(4) In order to implement the power supply cost recovery clause established pursuant to subsection (2), a utility shall file, contemporaneously with the power supply cost recovery plan required by subsection (3), a 5-year forecast of the power supply requirements of its customers, its anticipated sources of supply, and projections of power supply costs, in light of its existing sources of electrical generation and sources of electrical generation under construction. The forecast shall include a description of all relevant major contracts and power supply arrangements entered into or contemplated by the utility, and such other information as the commission may require.

(5) If a utility files a power supply cost recovery plan and a 5-year forecast as provided in subsections (3) and (4), the commission shall conduct a proceeding, to be known as a power supply and cost review, for the purpose of evaluating the reasonableness and prudence of the power supply cost recovery plan filed by a utility pursuant to subsection (3), and establishing the power supply cost recovery factors to implement a power supply cost recovery clause incorporated in the electric rates or rate schedule of the utility. The power supply and cost review shall be conducted as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969.

(6) In its final order in a power supply and cost review, the commission shall evaluate the reasonableness and prudence of the decisions underlying the power supply cost recovery plan filed by the utility pursuant to subsection (3), and shall approve, disapprove, or amend the power supply cost recovery plan accordingly. In evaluating the decisions underlying the power supply cost recovery plan, the commission shall consider the cost and availability of the electrical generation available to the utility; the cost of short-term firm purchases available to the utility; the availability of interruptible service; the ability of the utility to reduce or to eliminate any firm sales to out-of-state customers if the utility is not a multi-state utility whose firm sales are subject to other regulatory authority; whether the utility has taken all appropriate actions to minimize the cost of fuel; and other relevant factors. The commission shall approve, reject, or amend the 12 monthly power supply cost recovery factors requested by the utility in its power

supply cost recovery plan. The factors shall not reflect items the commission could reasonably anticipate would be disallowed under subsection (13). The factors ordered shall be described in fixed dollar amounts per unit of electricity, but may include specific amounts contingent on future events.

(7) In its final order in a power supply and cost review, the commission shall evaluate the decisions underlying the 5-year forecast filed by a utility pursuant to subsection (4). The commission may also indicate any cost items in the 5-year forecast that, on the basis of present evidence, the commission would be unlikely to permit the utility to recover from its customers in rates, rate schedules, or power supply cost recovery factors established in the future.

(8) The commission, on its own motion or the motion of any party, may make a finding and enter a temporary order granting approval or partial approval of a power supply cost recovery plan in a power supply and cost recovery review, after first having given notice to the parties to the review, and after having afforded to the parties to the review a reasonable opportunity for a full and complete hearing. A temporary order made pursuant to this subsection shall be considered a final order for purposes of judicial review.

(9) If the commission has made a final or temporary order in a power supply and cost review, the utility may each month incorporate in its rates for the period covered by the order any amounts up to the power supply cost recovery factors permitted in that order. If the commission has not made a final or temporary

order within 3 months of the submission of a complete power supply cost recovery plan, or by the beginning of the period covered in the plan, whichever comes later, or if a temporary order has expired without being extended or replaced, then pending an order which determines the power supply cost recovery factors, a utility may each month adjust its rates to incorporate all or a part of the power supply cost recovery factors requested in its plan. Any amounts collected under the power supply cost recovery factors before the commission makes its final order shall be subject to prompt refund with interest to the extent that the total amounts collected exceed the total amounts determined in the commission's final order to be reasonable and prudent for the same period of time.

(10) Not less than 3 months before the beginning of the third quarter of the 12-month period, the utility may file a revised power supply cost recovery plan which shall cover the remainder of the 12-month period. Upon receipt of the revised power supply cost recovery plan, the commission shall reopen the power supply and cost review. In addition, the commission may reopen the power supply and cost review on its own motion or on the showing of good cause by any party if at least 6 months have elapsed since the utility submitted its complete filing and if there are at least 60 days remaining in the 12-month period under consideration. A reopened power supply and cost review shall be conducted as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, and in accordance with subsections (3), (6), (8), and (9).

(11) Not more than 45 days following the last day of each billing month in which a power supply cost recovery factor has been applied to customers' bills, the utility shall file with the commission a detailed statement for that month of the revenues recorded pursuant to the power supply cost recovery factor and the allowance for cost of power supply included in the base rates established in the latest commission order for the utility, and the cost of power supply. The detailed statement shall be in the manner and form prescribed by the commission. The commission shall establish procedures for insuring that the detailed statement is promptly verified and corrected if necessary.

(12) Not less than once a year, and not later than 3 months after the end of the 12-month period covered by a utility's power supply cost recovery plan, the commission shall commence a proceeding, to be known as a power supply cost reconciliation, as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969. Reasonable discovery shall be permitted before and during the reconciliation proceeding in order to assist parties and interested persons in obtaining evidence concerning reconciliation issues including, but not limited to, the reasonableness and prudence of expenditures and the amounts collected pursuant to the clause. At the power supply cost reconciliation the commission shall reconcile the revenues recorded pursuant to the power supply cost recovery factors and the allowance for cost of power supply included in the base rates established in the latest commission order for the utility with the amounts actually expensed and included in the cost of

power supply by the utility. The commission shall consider any issue regarding the reasonableness and prudence of expenses for which customers were charged if the issue was not considered adequately at a previously conducted power supply and cost review.

(13) In its order in a power supply cost reconciliation, the commission shall:

(a) Disallow cost increases resulting from changes in accounting or rate-making expense treatment not previously approved by the commission. The commission may order the utility to pay a penalty not to exceed 25% of the amount improperly collected. Costs incurred by the utility for penalty payments shall not be charged to customers.

(b) Disallow any capacity charges associated with power purchased for periods in excess of 6 months unless the utility has obtained the prior approval of the commission. If the commission has approved capacity charges in a contract with a qualifying facility, as defined by the federal energy regulatory commission pursuant to the public utilities regulatory policies act of 1978, Public Law 95-617, 92 Stat. 3117, the commission shall not disallow the capacity charges for the facility in the power supply cost reconciliation unless the commission has ordered revised capacity charges upon reconsideration pursuant to this subsection. A contract shall be valid and binding in accordance with its terms and capacity charges paid pursuant to such a contract shall be recoverable costs of the utility for rate-making purposes notwithstanding that the order approving such a contract is later vacated, modified, or otherwise held to be invalid in whole or in part if the order approving the contract has not been stayed or suspended by a

competent court within 30 days after the date of the order, or within 30 days of the effective date of the 1987 amendatory act that added subsection (19) if the order was issued after September 1, 1986, and before the effective date of the 1987 amendatory act that added subsection (19). The scope and manner of the review of capacity charges for a qualifying facility shall be determined by the commission. Except as to approvals for qualifying facilities granted by the commission prior to June 1, 1987, proceedings before the commission seeking such approvals shall be conducted as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969. The commission, upon its own motion or upon application of any person, may reconsider its approval of capacity charges in a contested case hearing after passage of a period necessary for financing the qualifying facility, provided that:

(i) The commission has first issued an order making a finding based on evidence presented in a contested case that there has been a substantial change in circumstances since the commission's initial approval; and

(ii) Such a commission finding shall be set forth in a commission order subject to immediate judicial review.

The financing period for a qualifying facility during which previously approved capacity charges shall not be subject to commission reconsideration shall be 17.5 years, beginning with the date of commercial operation, for all qualifying facilities, except that the minimum financing period before reconsideration of the previously approved capacity charges shall be for

the duration of the financing for a qualifying facility which produces electric energy by the use of biomass, waste, wood, hydroelectric, wind, and other renewable resources, or any combination of renewable resources, as the primary energy source.

(c) Disallow net increased costs attributable to a generating plant outage of more than 90 days in duration unless the utility demonstrates by clear and satisfactory evidence that the outage, or any part of the outage, was not caused or prolonged by the utility's negligence or by unreasonable or imprudent management.

(d) Disallow transportation costs attributable to capital investments to develop a utility's capability to transport fuel or relocate fuel at the utility's facilities and disallow unloading and handling expenses incurred after receipt of fuel by the utility.

(e) Disallow the cost of fuel purchased from an affiliated company to the extent that such fuel is more costly than fuel of requisite quality available at or about the same time from other suppliers with whom it would be comparably cost beneficial to deal.

(f) Disallow charges unreasonably or imprudently incurred for fuel not taken.

(g) Disallow additional costs resulting from unreasonably or imprudently renegotiated fuel contracts.

(h) Disallow penalty charges unreasonably or imprudently incurred.

(i) Disallow demurrage charges.

(j) Disallow increases in charges for nuclear fuel disposal unless the utility has received the prior approval of the commission.

(14) In its order in a power supply cost reconciliation, the commission shall require a utility to refund to customers or credit to customers' bills any net amount determined to have been recovered over the period covered in excess of the amounts determined to have been actually expensed by the utility for power supply, and to have been incurred through reasonable and prudent actions not precluded by the commission order in the power supply and cost review. Such refunds or credits shall be apportioned among the customers of the utility utilizing procedures that the commission determines to be reasonable. The commission may adopt different procedures with respect to customers served under the various rate schedules of the utility and may, in appropriate circumstances, order refunds or credits in proportion to the excess amounts actually collected from each such customer during the period covered.

(15) In its order in a power supply cost reconciliation, the commission shall authorize a utility to recover from customers any net amount by which the amount determined to have been recovered over the period covered was less than the amount determined to have been actually expensed by the utility for power supply, and to have been incurred through reasonable and prudent actions not precluded by the commission order in the power supply and cost review. For excess costs incurred through management actions contrary to the commission's power supply and cost review order, the commission shall authorize a utility to recover costs incurred for power supply in the reconciliation period in excess of the amount recovered over the period only if the utility demonstrates by clear and convincing evidence that the excess expenses were

beyond the ability of the utility to control through reasonable and prudent actions. For excess costs incurred through management actions consistent with the commission's power supply and cost review order, the commission shall authorize a utility to recover costs incurred for power supply in the reconciliation period in excess of the amount recovered over the period only if the utility demonstrates that the level of such expenses resulted from reasonable and prudent management actions. Such amounts in excess of the amounts actually recovered by the utility for power supply shall be apportioned among and charged to the customers of the utility utilizing procedures that the commission determines to be reasonable. The commission may adopt different procedures with respect to customers served under the various rate schedules of the utility and may, in appropriate circumstances, order charges to be made in proportion to the amounts which would have been paid by such customers if the amounts in excess of the amounts actually recovered by the utility for cost of power supply had been included in the power supply cost recovery factors with respect to such customers during the period covered. Charges for such excess amounts shall be spread over a period that the commission determines to be appropriate.

(16) If the commission orders refunds or credits pursuant to subsection (14), or additional charges to customers pursuant to subsection (15), in its final order in a power supply cost reconciliation, the refunds, credits, or additional charges shall include interest. In determining the interest included in a refund, credit, or additional charge pursuant to this subsection, the commission shall consider, to the

extent material and practicable, the time at which the excess recoveries or insufficient recoveries, or both occurred. The commission shall determine a rate of interest for excess recoveries, refunds, and credits equal to the greater of the average short-term borrowing rate available to the utility during the appropriate period, or the authorized rate of return on the common stock of the utility during that same period. Costs incurred by the utility for refunds and interest on refunds shall not be charged to customers. The commission shall determine a rate of interest for insufficient recoveries and additional charges equal to the average short-term borrowing rate available to the utility during the appropriate period.

(17) To avoid undue hardship or unduly burdensome or excessive cost, the commission may:

(a) Exempt an electric utility with fewer than 200,000 customers in the state of Michigan from 1 or more of the procedural provisions of this section or may modify the filing requirements of this section.

(b) Exempt an energy utility organized as a cooperative corporation pursuant to sections 98 to 109 of Act No. 327 of the Public Acts of 1931, being sections 450.98 to 450.109 of the Michigan Compiled Laws, from 1 or more of the provisions of this section.

(18) Notwithstanding any other provision of this act, the commission may, upon application by an electric utility, set power supply cost recovery factors, in a manner otherwise consistent with this act, in an order resulting from a general rate case. Within 120 days following the effective date of this section, for the purpose of setting power supply cost recovery factors, the commission shall permit an electric utility to

reopen a general rate case in which a final order was issued within 120 days before or after the effective date of this section or to amend an application or reopen the evidentiary record in a pending general rate case. If the commission sets power supply cost recovery factors in an order resulting from a general rate case:

(a) The power supply cost recovery factors shall cover a future period of 48 months or the number of months which elapse until the commission orders new power supply cost recovery factors in a general rate case, whichever is the shorter period.

(b) Annual reconciliation proceedings shall be conducted pursuant to subsection (12) and if an annual reconciliation proceeding shows a recoverable amount pursuant to subsection (15), the commission shall authorize the electric utility to defer the amount and to accumulate interest on the amount pursuant to subsection (16), and in the next order resulting from a general rate case authorize the utility to recover the amount and interest from its customers in the manner provided in subsection (15).

(c) The power supply cost recovery factors shall not be subject to revision pursuant to subsection (10).

(19) Five years after the effective date of the amendatory act that added this subsection, and every 5 years thereafter, the standing committees of the house and senate that deal with public utilities shall review the amendatory act that added this subsection.

460.6k Initial power supply cost recovery plan; filing; alteration of rate schedule in accordance with adjustment clause; charges in excess of base rate; revenues subject to existing

reconciliation proceedings; revenues resulting from certain adjustment clauses subject to existing reconciliation proceedings; revenues subject to annual reconciliation; procedures; lag correction provision; adjustment of rates pending approval or disapproval of power supply cost recovery clause.

Sec. 6k. (1) This section shall govern the initial filing and implementation of a power supply cost recovery plan under section 6j(3).

(2) The initial power supply cost recovery plan may be for a period of less than 12 months and shall be filed:

(a) By an electric utility subject to commission rate jurisdiction with at least 200,000 residential customers in the state of Michigan, within 4 months after the effective date of this section.

(b) By all other electric utilities subject to commission rate jurisdiction, within 15 months after the effective date of this section in accordance with the provisions of this act which the commission determines to be appropriate for the individual utility.

(3) Notwithstanding section 6a(3), until the expiration of 3 months plus the remainder of the then current billing month following the last day on which a utility is required to file its first power supply cost recovery plan pursuant to subsection (2) of this section, the utility may alter its rate schedule in accordance with an existing fuel cost adjustment clause or purchased and net interchanged power adjustment clause. Thereafter, the utility may make charges in excess of base rates for the cost of power supply

pursuant only to subsections (2) and (4) of this section. After the effective date of this section, any revenues resulting from an existing fuel cost adjustment clause or purchased and net interchanged power adjustment clause and recorded for an annual reconciliation period ending prior to January 1, 1983, by an electric utility shall be subject to the existing reconciliation proceeding established by the commission for the utility. In this proceeding, the commission shall consider the reasonableness and prudence of expenditures charged pursuant to an existing fuel cost adjustment clause or purchased and net interchanged power adjustment clause after the effective date of this section. On and after January 1, 1983, all fuel cost and purchased and net interchanged power revenues received by an electric utility, whether included in base rates or collected pursuant to a fuel or purchased and net interchanged power adjustment clause or a power supply cost recovery clause, shall be subject to annual reconciliation with the cost of fuel and purchased and net interchanged power. Such annual reconciliations shall be conducted in accordance with the reconciliation procedures described in section 6j(12) to (18), including the provisions for refunds, additional charges, deferral and recovery, and shall include consideration by the commission of the reasonableness and prudence of expenditures charged pursuant to any fuel or purchased and net interchanged power adjustment clause in existence during the period being reconciled. If the utility has a lag correction provision included in its existing adjustment clauses, the commission shall allow any adjustment to rates attributable to such lag correction provision to be implemented for the 3 billing months

immediately succeeding the final billing month in which the existing adjustment clauses as operative.

(4) Until the commission approves or disapproves a power supply cost recovery clause in a final commission order in a contested case required by section 6j(2), a utility which had a fuel cost adjustment clause or purchased and net interchanged power adjustment clause on the effective date of this section and which has applied for a power supply cost recovery clause under section 6j may adjust its rates pursuant to section 6j(3) to (18), to include power supply cost recovery factors.

460.6l Insuring equitable representation of interests of energy utility customers; definitions; utility consumer participation board; creation; powers and duties; number and appointment of members; "utility" defined; member requirements; terms; vacancy; removal of member; meetings; quorum; election of chairperson and vice-chairperson; conducting business of board at public meeting; public notice; availability of writings to public; expense reimbursement and remuneration; limits; temporary administrator of fund.

Sec. 6l. (1) For purposes of implementing sections 6h, 6i, 6j, and 6k, this section and section 6m shall provide means of insuring equitable representation of the interests of energy utility customers.

(2) As used in this section and section 6m:

(a) "Annual receipts" means the payments received by the fund under section 6m(2)(a) and (b) during a calendar year.

(b) "Board" means the utility consumer participation board created under subsection (3).

(c) "Department" means the department of management and budget.

(d) "Energy cost recovery proceeding" means any proceeding to establish or implement a gas cost recovery clause or a power supply cost recovery clause as provided in sections 6h, 6i, 6j, or 6k, to set gas cost recovery factors pursuant to section 6h(17), or to set power supply cost recovery factors pursuant to section 6j(18).

(e) "Energy utility" means each electric or gas company regulated by the public service commission.

(f) "Fund" means the utility consumer representation fund created in section 6m.

(g) "Household" means a single-family home, duplex, mobile home, seasonal dwelling, farm home, cooperative, condominium, or apartment which has normal household facilities such as a bathroom, individual cooking facilities, and kitchen sink facilities. Household does not include a penal or corrective institution, or a motel, hotel, or other similar structure if used as a transient dwelling.

(h) "Jurisdictional" means subject to rate regulation by the Michigan public service commission.

(i) "Net grant proceeds" means the annual receipts of the fund less the amounts reserved for the attorney general's use and the amounts expended for board expenses and operation.

(j) "Residential energy utility consumer" or "consumer" means a customer of an energy utility who receives utility service for use within an individual

household or an improvement reasonably appurtenant to and normally associated with an individual household.

(k) "Residential tariff sales" means those sales by an energy utility which are subject to residential tariffs on file with the commission.

(l) "Utility consuming industry" means a person, sole proprietorship, partnership, association, corporation, or other entity which receives utility service ordinarily and primarily for use in connection with the manufacture, sale, or distribution of goods or the provision of services, but does not include a nonprofit organization representing residential utility customers.

(3) The utility consumer participation board is created within the department and shall exercise its powers and duties under this act independently of the department. The procurement and related management functions of the commission shall be performed under the direction and supervision of the department. The board shall consist of 5 members appointed by the governor, 1 of whom shall be chosen from 1 or more lists of qualified persons submitted by the attorney general.

(4) For the purposes of subsection (5) only, "utility" means an electric or gas company located in or outside of this state.

(5) Each member of the board shall meet the following requirements:

(a) Shall be an advocate for the interests of residential utility consumers, as demonstrated by the member's knowledge of and support for consumer

interests and concerns in general or specifically related to utility matters.

(b) Shall not be, or shall not have been within the 5 years preceding appointment, a member of a governing body of, or employed in a managerial or professional or consulting capacity by a utility or an association representing utilities; an enterprise or professional practice which received over $1,500.00 in the year preceding the appointment as a supplier of goods or services to a utility or association representing utilities; or an organization representing employees of such a utility, association, enterprise, or professional practice, or an association which represents such an organization.

(c) Shall not have, or shall not have had within 1 year preceding appointment, a financial interest exceeding $1,500.00 in a utility, an association representing utilities, or an enterprise or professional practice which received over $1,500.00 in the year preceding the appointment as a supplier of goods or services to a utility or association representing utilities.

(d) Shall not be an officer or director of an applicant for a grant under section 6m.

(e) Shall not be a member of the immediate family of a person who would be ineligible under subdivisions (a), (b), (c), or (d).

(6) The members of the board shall be appointed for 2-year terms beginning with the first day of a legislative session in an odd-numbered year and ending on the day before the first day of the legislative session in the next odd-numbered year or when the members' successors are appointed, whichever occurs later. The governor shall not appoint a member to the

board for a term commencing after the governor's term of office has ended. A vacancy shall be filled in the same manner as the original appointment. If the vacancy is created other than by expiration of a term, the member shall be appointed for the balance of the unexpired term of the member to be succeeded.

(7) The governor shall remove a member of the board if that member is absent for any reason from either 3 consecutive board meetings or more than 50% of the meetings held by the board in a calendar year. However, a person who is removed due to absenteeism is eligible for reappointment to fill a vacancy which occurs in the board membership. The governor also shall remove a member of the board if the member is subsequently determined to be ineligible under subsection (5).

(8) The board shall hold bimonthly meetings and additional meetings as necessary. A quorum consists of 3 members. A majority vote of the members appointed and serving is necessary for a decision. At its first meeting following the appointment of new members, or as soon as possible after the first meeting, the board shall elect biennially from its membership a chairperson and a vice-chairperson.

(9) The board shall not act directly to represent the interests of residential utility consumers except through administration of the fund and grant program under this section.

(10) The business which the board may perform shall be conducted at a public meeting of the board held in compliance with the open meetings act, Act No.

267 of the Public Acts of 1976, being sections 15.261 to 15.275 of the Michigan Compiled Laws. Public notice of the time, date, and place of the meeting shall be given in the manner required by Act No. 267 of the Public Acts of 1976.

(11) A writing prepared, owned, used, in the possession of, or retained by the board in the performance of an official function shall be made available to the public in compliance with the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws.

(12) A member of the board may be reimbursed for actual and necessary expenses, including travel expenses to and from each meeting held by the board, incurred in discharging the member's duties under this section and section 6m. In addition to expense reimbursement, a board member may receive remuneration from the board of $100.00 per meeting attended, not to exceed $1,000.00 in a calendar year. These limits shall be adjusted proportionately to an adjustment in the remittance amounts under section 6m(4) to allow for changes in the cost of living.

(13) Until the board certifies that it is operating and ready to perform all duties under this act, the director of the energy administration created by executive directives 1976-2 and 1976-5 shall serve as temporary administrator of the fund and exercise all duties and powers of the board.

460.6m Utility consumer representation fund; creation as special fund; investment and release of money; remittances by energy utility; factor; action for recovery of disputed amount; action on application for energy cost recovery proceedings; conditions; acceptance of gift or grant; payment of operating costs and expenses; net grant proceeds to finance grant program; application; form; consideration; encouraging representation of different consumer interests; criteria; inviting applicants to file jointly and awarding grant to be managed cooperatively; disbursements; notice of availability of fund; use of annual receipts and interest; retention of certain amounts; conditions applicable to grants; reports; reviewing relationship between costs and benefits.

Sec. 6m. (1) The utility consumer representation fund is created as a special fund. The state treasurer shall be the custodian of the fund and shall maintain a separate account of the money in the fund. The money in the fund shall be invested in the bonds, notes, and other evidences of indebtedness issued or insured by the United States government and its agencies, and in prime commercial paper. The state treasurer shall release money from the fund, including interest earned, in the manner and at the time directed by the board.

(2) Except as provided in subsection (6), each energy utility which has applied to the public service commission for the initiation of an energy cost recovery proceeding shall remit to the fund prior to or upon filing its initial application for such a proceeding, and

on or before the first anniversary of that application, an amount of money determined by the board in the following manner:

(a) In the case of an energy utility company serving at least 100,000 customers in this state, an amount which bears to $300,000.00, multiplied by a factor as provided in subsection (4), the same proportion as the company's jurisdictional 1981 total operating revenues, as stated in its annual report, bear to the jurisdictional 1981 total operating revenues of all energy utility companies serving at least 100,000 customers in this state. This amount shall be made available by the board for use by the attorney general for the purposes described in subsection (17).

(b) In the case of an energy utility company serving at least 100,000 residential customers in this state, an amount which bears to $300,000.00, multiplied by a factor as provided in subsection (4), the same proportion as the company's jurisdictional 1981 gross revenues from residential tariff sales bear to the jurisdictional 1981 gross revenues from residential tariff sales of all energy utility companies serving at least 100,000 residential customers in this state. This amount shall be used for grants under subsection (11).

(3) Payments made by an energy utility under subsection (2)(a) shall be operating expenses of the utility which the public service commission shall permit the utility to charge to its customers. Payments made by a utility under subsection (2)(b) shall be operating expenses of the utility which the public service commission shall permit the utility to charge to its residential customers.

(4) For purposes of subsection (2), the factor shall be set by the board at a level not to exceed the percentage increase in the index known as the consumer price index for urban wage earners and clerical workers, select areas, all items indexed, for the Detroit standard metropolitan statistical area, compiled by the bureau of labor statistics of the United States department of labor, or any successor agency, which has occurred between January 1981 and January of the year in which the payment is required to be made. In the event that more than 1 such index is compiled, the index yielding the largest payment shall be the maximum allowable factor. The board shall advise utilities of the factor.

(5) On or before the second and succeeding anniversaries of its initial application for an energy cost recovery proceeding, an energy utility shall remit to the board amounts equal to 5/6 of the amounts required under subsection (2).

(6) The remittance requirements of this section shall not apply to an energy utility organized as a cooperative corporation pursuant to sections 98 to 109 of Act No. 327 of the Public Acts of 1931, being sections 450.98 to 450.109 of the Michigan Compiled Laws, and grants from the fund shall not be used to participate in an energy cost recovery proceeding primarily affecting such a utility.

(7) In the event of a dispute between the board and an energy utility about the amount of payment due, the utility shall pay the undisputed amount and, if the utility and the board cannot agree, the board may initiate civil action in the circuit court for Ingham

county for recovery of the disputed amount. The commission shall not accept or take action on an application for an energy cost recovery proceeding from an energy utility subject to this section which has not fully paid undisputed remittances required by this section.

(8) The commission shall not accept or take action on an application for an energy cost recovery proceeding from an energy utility subject to this section until 30 days after it has been notified by the board or the director of the energy administration, if section 6*l*(13) is applicable, that the board or the director is ready to process grant applications, will transfer funds payable to the attorney general immediately upon the receipt of such funds, and will within 30 days approve grants and remit funds to qualified grant applicants.

(9) The board may accept a gift or grant from any source to be deposited in the fund if the conditions or purposes of the gift or grant are consistent with this section.

(10) The costs of operation and expenses incurred by the board in performing its duties under this section and section 6l, including remuneration to board members, shall be paid from the fund. A maximum of 5% of the annual receipts of the fund may be budgeted and used to pay expenses other than grants made under subsection (11).

(11) The net grant proceeds shall finance a grant program from which the board may award to an

applicant an amount which the board determines shall be used for the purposes set forth in this section.

(12) The board shall create and make available to applicants an application form. Each applicant shall indicate on the application how the applicant meets the eligibility requirements provided for in this section and how the applicant proposes to use a grant from the fund to participate in 1 or more proceedings as authorized in subsection (17) which have been or are expected to be filed. The board shall receive an application requesting a grant from the fund only from a nonprofit organization or a unit of local government in this state. The board shall consider only applications for grants containing proposals which are in keeping with subsections (17) and (18) and which serve the interests of residential utility consumers. For purposes of making grants, the board may consider protection of the environment, energy conservation, the creation of employment and a healthy economy in the state, and the maintenance of adequate energy resources. The board shall not consider an application which primarily benefits the applicant or a service provided or administered by the applicant. The board shall not consider an application from a nonprofit organization if 1 of the organization's principal interests or unifying principles is the welfare of a utility or its investors or employees, or the welfare of 1 or more businesses or industries, other than farms not owned or operated by a corporation, which receive utility service ordinarily and primarily for use in connection with the profit-seeking manufacture, sale, or distribution of goods or services. Mere ownership of securities by a nonprofit organization or its members

shall not disqualify an application submitted by that organization.

(13) The board shall encourage the representation of the interests of identifiable types of residential utility consumers whose interests may differ, including various social and economic classes and areas of the state, and if necessary, may make grants to more than 1 applicant whose applications are related to a similar issue to achieve this type of representation. In addition, the board shall consider and balance the following criteria in determining whether to make a grant to an applicant:

(a) Evidence of the applicant's competence, experience, and commitment to advancing the interests of residential utility consumers.

(b) In the case of a nongovernmental applicant, the extent to which the applicant is representative of or has a previous history of advocating the interests of citizens, especially residential utility consumers.

(c) The anticipated effect of the proposal contained in the application on residential utility consumers, including the immediate and long-term impacts of the proposal.

(d) Evidence demonstrating the potential for continuity of effort and the development of expertise in relation to the proposal contained in the application.

(e) The uniqueness or innovativeness of an applicant's position or point of view, and the probability and desirability of that position or point of view prevailing.

(14) As an alternative to choosing between 2 or more applications which have similar proposals, the

board may invite 2 or more of the applicants to file jointly and award a grant to be managed cooperatively.

(15) The board shall make disbursements pursuant to a grant in advance of an applicant's proposed actions as set forth in the application if necessary to enable the applicant to initiate, continue, or complete the proposed actions.

(16) Any notice to utility customers and the general public of hearings or other state proceedings in which grants from the fund may be used shall contain a notice of the availability of the fund and the address of the board.

(17) The annual receipts and interest earned, less administrative costs, may be used only for participation in administrative and judicial proceedings under sections 6h, 6i, 6j, and 6k, and in federal administrative and judicial proceedings which directly affect the energy costs paid by Michigan energy utilities. Amounts which have been in the fund more than 12 months may be retained in the fund for future grants, or may be returned to energy utility companies or used to offset their future remittances in proportion to their previous remittances to the fund, as the board determines will best serve the interests of consumers.

(18) The following conditions shall apply to all grants from the fund:

(a) Disbursements from the fund may be used only to advocate the interests of energy utility customers or classes of energy utility customers, and not for representation of merely individual interests.

(b) The board shall attempt to maintain a reasonable relationship between the payments from a particular energy utility and the benefits to consumers of that utility.

(c) The board shall coordinate the funded activities of grant recipients with those of the attorney general to avoid duplication of effort, to promote supplementation of effort, and to maximize the number of hearings and proceedings with intervenor participation.

(19) A recipient of a grant pursuant to subsection (11) may use the grant only for the advancement of the proposed action approved by the board, including, but not limited to, costs of staff, hired consultants and counsel, and research.

(20) A recipient of a grant under subsection (11) shall file a report with the board within 90 days following the end of the year or a shorter period for which the grant is made. The report shall be made in a form prescribed by the board and shall be subject to audit by the board. The report shall include the following information:

(a) An account of all grant expenditures made by the grant recipient. Expenditures shall be reported within the following categories:

(i) Employee and contract for services costs.

(ii) Costs of materials and supplies.

(iii) Filing fees and other costs required to effectively represent residential utility consumers as provided in this section.

(b) Any additional information concerning uses of the grant required by the board.

(21) The attorney general shall file a report with the house and senate committees on appropriations within 90 days following the end of each fiscal year. The report shall include the following information:

(a) An account of all expenditures made by the attorney general of funds received under this section. Expenditures shall be reported within the following categories:

(i) Employee and contract for services costs.

(ii) Costs of materials and supplies.

(iii) Filing fees and other costs required to effectively represent utility consumers as provided in this section.

(b) Any additional information concerning uses of the funds received under this section required by the committees.

(22) On or before July 1 of each calendar year, the board shall submit a detailed report to the legislature regarding the discharge of duties and responsibilities under this section and section 6l during the preceding calendar year.

(23) Three years after the effective date of this section, and at 3-year intervals thereafter, a senate committee chosen by the majority leader of the senate and a house committee chosen by the speaker of the house of representatives shall review the relationship between costs and benefits resulting from this section and sections 6h through 6*l*, and may recommend changes to the legislature.

APPENDIX K

ADMINISTRATIVE PROCEDURES ACT OF 1969
Act 306 of 1969

AN ACT to provide for the effect, processing, promulgation, publication, and inspection of state agency rules, determinations, and other matters; to provide for the printing, publishing, and distribution of certain publications; to provide for state agency administrative procedures and contested cases and appeals from contested cases in licensing and other matters; to create and establish certain committees and offices; to provide for declaratory judgments as to rules; to repeal certain acts and parts of acts; and to repeal certain parts of this act on a specific date.

CHAPTER 1 GENERAL PROVISIONS

24.201 Administrative procedures; short title.

Sec. 1. This act shall be known and may be cited as the "administrative procedures act of 1969".

24.203 Definitions; A to G.

Sec. 3. (1) "Adoption of a rule" means that step in the processing of a rule consisting of the formal action of an agency establishing a rule before its promulgation.

(2) "Agency" means a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action. Agency does not include an agency in the legislative or judicial branch of state government, the governor, an agency having direct governing control over an institution of higher education, the state civil service commission, or an association of insurers created under the insurance code of 1956, Act No. 218 of the Public Acts of 1956, being sections 500.100 to 500.8302 of the Michigan Compiled Laws, or other association or facility formed under Act No. 218 of the Public Acts of 1956 as a nonprofit organization of insurer members.

(3) "Contested case" means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal from its decision is taken to another agency, the hearing and the appeal are deemed to be a continuous proceeding as though before a single agency.

(4) "Committee" means the joint committee on administrative rules.

(5) "Court" means the circuit court.

(6) "Guideline" means an agency statement or declaration of policy which the agency intends to follow, which does not have the force or effect of law, and which binds the agency but does not bind any other person.

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CHAPTER 4
PROCEDURES IN CONTESTED CASES

24.271 Parties in contested case; time and notice of hearing; service of notice or other process on legislator.

Sec. 71. (1) The parties in a contested case shall be given an opportunity for a hearing without undue delay.

(2) The parties shall be given a reasonable notice of the hearing, which notice shall include:

(a) A statement of the date, hour, place, and nature of the hearing. Unless otherwise specified in the notice the hearing shall be held at the principal office of the agency.

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held.

(c) A reference to the particular sections of the statutes and rules involved.

(d) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is given, the initial notice may state the issues involved. Thereafter on application the agency or other party shall furnish a more definite and detailed statement on the issues.

(3) A member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter except on a day on which there is a scheduled meeting of the house of which he

or she is a member. However, a member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter on a day on which there is a scheduled meeting of the house of which he or she is a member, if such service of notice or process is executed by certified mail, return receipt requested.

24.272 Defaults, written answers, evidence, argument, cross-examination.

Sec. 72. (1) If a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party.

(2) A party who has been served with a notice of hearing may file a written answer before the date set for hearing.

(3) The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact.

(4) A party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. A party may submit rebuttal evidence.

24.273 Subpoenas; issuance; revocation.

Sec. 73. An agency authorized by statute to issue subpoenas, when a written request is made by a party in a contested case, shall issue subpoenas forthwith

requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence and documents in their possession or under their control. On written request, the agency shall revoke a subpoena if the evidence, the production of which is required, does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. Witness fees shall be paid to subpoenaed witnesses in accordance with section 2552 of Act No. 236 of the Public Acts of 1961, as amended, being section 600.2552 of the Compiled Laws of 1948. In case of refusal to comply with a subpoena, the party on whose behalf it was issued may file a petition, in the circuit court for Ingham county or for the county in which the agency hearing is held, for an order requiring compliance.

24.274 Oaths; depositions; disclosure of agency records.

Sec. 74. (1) An officer of an agency may administer an oath or affirmation to a witness in a matter before the agency, certify to official acts and take depositions. A deposition may be used in lieu of other evidence when taken in compliance with the general court rules. An agency authorized to adjudicate contested cases may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings.

(2) An agency that relies on a witness in a contested case, whether or not an agency employee,

who has made prior statements or reports with respect to the subject matter of his testimony, shall make such statements or reports available to opposing parties for use on cross-examination. On a request for identifiable agency records, with respect to disputed material facts involved in a contested case, except records related solely to the internal procedures of the agency or which are exempt from disclosure by law, an agency shall make such records promptly available to a party.

24.275 Evidence; admissibility, objections, submission in written form.

Sec. 75. In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Irrelevant, immaterial or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law. Objections to offers of evidence may be made and shall be noted in the record. Subject to these requirements, an agency, for the purpose of expediting hearings and when the interests of the parties will not be substantially prejudiced thereby, may provide in a contested case or by rule for submission of all or part of the evidence in written form.

24.275a Definitions; hearing where witness testifies as alleged victim of sexual, physical, or psychological abuse; use of dolls or mannequins; support person; notice; ruling on objection; exclusion of persons not necessary to

proceeding; section additional to other protections or procedures.

Sec. 75a. (1) As used in this section:

(a) "Developmental disability" means that term as defined in section 100a of the mental health code, 1974 PA 258, MCL 330.1100a except that, for the purposes of implementing this section, developmental disability includes only a condition that is attributable to a mental impairment or to a combination of mental and physical impairments, and does not include a condition attributable to a physical impairment unaccompanied by a mental impairment.

(b) "Witness" means an alleged victim under subsection (2) who is either of the following:

(i) A person under 16 years of age.

(ii) A person 16 years of age or older with a developmental disability.

(2) This section only applies to a contested case in which a witness testifies as an alleged victim of sexual, physical, or psychological abuse. As used in this subsection, "psychological abuse" means an injury to the witness's mental condition or welfare that is not necessarily permanent but results in substantial and protracted, visibly demonstrable manifestations of mental distress.

(3) If pertinent, the witness shall be permitted the use of dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination.

(4) A witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. A notice of intent to use a support person shall name the support person, identify the relationship the support person has with the witness, and give notice to all parties to the proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person shall be served upon all parties to the proceeding. The agency shall rule on any objection to the use of a named support person prior to the date at which the witness desires to use the support person.

(5) In a hearing under this section, all persons not necessary to the proceeding shall be excluded during the witness's testimony.

(6) This section is in addition to other protections or procedures afforded to a witness by law or court rule.

24.276 Evidence to be entered on record; documentary evidence.

Sec. 76. Evidence in a contested case, including records and documents in possession of an agency of which it desires to avail itself, shall be offered and made a part of the record. Other factual information or evidence shall not be considered in determination of the case, except as permitted under section 77. Documentary evidence may be received in the form of a copy or excerpt, if the original is not readily available, or may be incorporated by reference, if the

materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original when available.

24.277 Official notice of facts; evaluation of evidence.

Sec. 77. An agency in a contested case may take official notice of judicially cognizable facts, and may take notice of general, technical or scientific facts within the agency's specialized knowledge. The agency shall notify parties at the earliest practicable time of any noticed fact which pertains to a material disputed issue which is being adjudicated, and on timely request the parties shall be given an opportunity before final decision to dispute the fact or its materiality. An agency may use its experience, technical competence and specialized knowledge in the evaluation of evidence presented to it.

24.278 Stipulations; disposition of cases, methods.

Sec. 78. (1) The parties in a contested case by a stipulation in writing filed with the agency may agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties are requested to thus agree upon facts when practicable.

(2) Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default or other method agreed upon by the parties.

24.279 Presiding officers; designation; disqualification, inability.

Sec. 79. An agency, 1 or more members of the agency, a person designated by statute or 1 or more hearing officers designated and authorized by the agency to handle contested cases, shall be presiding officers in contested cases. Hearings shall be conducted in an impartial manner. On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. When a presiding officer is disqualified or it is impracticable for him to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to the party will result therefrom.

24.280 Presiding officer; powers and duties; "nonmeeting day" defined.

Sec. 80. (1) A presiding officer may do all of the following:

(a) Administer oaths and affirmations.

(b) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence.

(c) Provide for the taking of testimony by deposition.

(d) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.

(e) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties.

(f) Act upon an application for an award of costs and fees under sections 121 to 127.

(2) In order to assure adequate representation for the people of this state, when the presiding officer knows that a party in a contested case is a member of the legislature of this state, and the legislature is in session, the contested case shall be continued by the presiding officer to a nonmeeting day.

(3) In order to assure adequate representation for the people of this state, when the presiding officer knows that a party to a contested case is a member of the legislature of this state who serves on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned, or that is scheduled to meet during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet, the contested case shall be continued to a nonmeeting day.

(4) In order to assure adequate representation for the people of this state, when the presiding officer knows that a witness in a contested case is a member of the legislature of this state, and the legislature is in session, or the member is serving on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned or during the interim between legislative sessions after

the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet the contested case need not be continued, but the taking of the legislator's testimony, as a witness shall be postponed to the earliest practicable nonmeeting day.

(5) The presiding officer shall notify all parties to the contested case, and their attorneys, of any continuance granted pursuant to this section.

(6) As used in this section, "nonmeeting day" means a day on which there is not a scheduled meeting of the house of which the party or witness is a member, nor a legislative committee meeting or public hearing scheduled by a committee, subcommittee, commission, or council of which he or she is a member, nor a scheduled partisan caucus of the members of the house of which he or she is a member.

24.281 Proposals for decision; contents.

Sec. 81. (1) When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served on the parties, and an opportunity is given to each party adversely affected to file exceptions and present written arguments to the officials who are to make the decision. Oral argument may be permitted with consent of the agency.

(2) The proposal for decision shall contain a statement of the reasons therefor and of each issue of

fact and law necessary to the proposed decision, prepared by a person who conducted the hearing or who has read the record.

(3) The decision, without further proceedings, shall become the final decision of the agency in the absence of the filing of exceptions or review by action of the agency within the time provided by rule. On appeal from or review of a proposal of decision the agency, except as it may limit the issue upon notice or by rule, shall have all the powers which it would have if it had presided at the hearing.

(4) The parties, by written stipulation or at the hearing, may waive compliance with this section.

24.282 Communications by agency staff; limitations; exceptions.

Sec. 82. Unless required for disposition of an ex parte matter authorized by law, a member or employee of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case. This section

does not apply to an agency employee, or party representative with professional training in accounting, actuarial science, economics, financial analysis or rate-making, in a contested case before the financial institutions bureau, the insurance bureau or the public service commission insofar as the case involves rate-making or financial practices or conditions.

24.285 Final decision and order.

Sec. 85. A final decision or order of an agency in a contested case shall be made, within a reasonable period, in writing or stated in the record and shall include findings of fact and conclusions of law separated into sections captioned or entitled "findings of fact" and "conclusions of law", respectively. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. If a party submits proposed findings of fact that would control the decision or order, the decision or order shall include a ruling upon each proposed finding. Each conclusion of law shall be supported by authority or reasoned opinion. A decision or order shall not be made except upon consideration of the record as a whole or a portion of the record as may be cited by any party to the proceeding and as supported by and in accordance with the competent, material, and substantial evidence. A copy of the decision or order shall be delivered or mailed immediately to each party and to his or her attorney of record.

24.286 Official records of hearings.

Sec. 86. (1) An agency shall prepare an official record of a hearing which shall include:

(a) Notices, pleadings, motions and intermediate rulings.

(b) Questions and offers of proof, objections and rulings thereon.

(c) Evidence presented.

(d) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose.

(e) Proposed findings and exceptions.

(f) Any decision, opinion, order or report by the officer presiding at the hearing and by the agency.

(2) Oral proceedings at which evidence is presented shall be recorded, but need not be transcribed unless requested by a party who shall pay for the transcription of the portion requested except as otherwise provided by law.

24.287 Rehearings.

Sec. 87. (1) An agency may order a rehearing in a contested case on its own motion or on request of a party.

(2) Where for justifiable reasons the record of testimony made at the hearing is found by the agency to be inadequate for purposes of judicial review, the agency on its own motion or on request of a party shall order a rehearing.

(3) A request for a rehearing shall be filed within the time fixed by this act for instituting proceedings for judicial review. A rehearing shall be noticed and conducted in the same manner as an original hearing. The evidence received at the rehearing shall be included in the record for agency reconsideration and for judicial review. A decision or order may be amended or vacated after the rehearing.

* * *

APPENDIX L

CONSTITUTION OF 1963

Art. 6, § 28

§ 28. Administrative action, review

Sec. 28. All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law.

Property tax valuation or allocation; review

In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation.

APPENDIX M

MICHIGAN RULES OF COURT

STATE

2008

Rule 7.215 Opinions, Orders, Judgments, and Final Process from Court of Appeals

* * *

(C) Precedent of Opinions.

(1) An unpublished opinion is not precedentially binding under the rule of stare decisis. A party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears.

(2) A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis. The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals.

* * *

(J) Resolution of Conflicts in Court of Appeals Decisions.

(1) *Precedential Effect of Published Decisions.* A panel of the Court of Appeals must follow the rule of

law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

(2) *Conflicting Opinion.* A panel that follows a prior published decision only because it is required to do so by subrule (1) must so indicate in the text of its opinion, citing this rule and explaining its disagreement with the prior decision. The panel's opinion must be published in the official reports of opinions of the Court of Appeals.

(3) *Convening of Special Panel.*

(a) Poll of Judges. Except as provided in subrule (3)(b), within 28 days after release of the opinion indicating disagreement with a prior decision as provided in subrule (2), the chief judge must poll the judges of the Court of Appeals to determine whether the particular question is both outcome determinative and warrants convening a special panel to rehear the case for the purpose of resolving the conflict that would have been created but for the provisions of subrule (1). Special panels may be convened to consider outcome-determinative questions only.

(b) Effect of Pending Supreme Court Appeal. No poll shall be conducted and a special panel shall not be convened if, at the time the judges are required to be polled, the Supreme Court has granted leave to appeal in the controlling case.

(c) Order. Immediately following the poll, an order reflecting the result must be entered. The chief clerk of the Court of Appeals must provide a

copy of the order to the Clerk of the Supreme Court. The order must be published in the official reports of opinions of the Court of Appeals.

(4) *Composition of Panel.* A special panel convened pursuant to this rule consists of 7 judges of the Court of Appeals selected by lot, except that judges who participated in either the controlling decision or the opinion in the case at bar may not be selected.

(5) *Consideration of Case by Panel.* An order directing the convening of a special panel must vacate only that portion of the prior opinion in the case at bar addressing the particular question that would have been decided differently but for the provisions of subrule (1). The special panel shall limit its review to resolving the conflict that would have been created but for the provisions of subrule (1) and applying its decision to the case at bar. The parties are permitted to file supplemental briefs, and are entitled to oral argument before the special panel unless the panel unanimously agrees to dispense with oral argument. The special panel shall return to the original panel for further consideration [of] any remaining, unresolved issues, as the case may require.

(6) *Decision.* The decision of the special panel must be by published opinion or order and is binding on all panels of the Court of Appeals unless reversed or modified by the Supreme Court.

(7) *Reconsideration; Appeal.* There is no appeal from the decision of the Court of Appeals as to whether to convene a special panel. As to the decision in the case at bar, the time limits for moving for

reconsideration or for filing an application for leave to appeal to the Supreme Court run from the date of the order declining to convene a special panel or, if a special panel is convened, from the date of the decision of the special panel, except that, if the case is returned to the original panel for further consideration in accordance with subrule (5), the time limits shall run from the date of the original panel's decision, after return from the special panel. If a motion for reconsideration is filed, it shall be submitted to the special panel, which, if appropriate, may refer some or all of the issues presented to the original panel.

Supreme Court, U.S.
FILED
08-246 AUG 25 2008
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

MICHIGAN ENVIRONMENTAL COUNCIL,
Petitioner,

v.

MICHIGAN PUBLIC SERVICE COMMISSION AND INDIANA MICHIGAN POWER COMPANY,
Respondents.

On Petition for Writ of Certiorari to the Michigan Court of Appeals

VOLUME 2 OF APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES

MICHIGAN ENVIRONMENTAL COUNCIL
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v.

MICHIGAN PUBLIC SERVICE COMMISSION and INDIANA MICHIGAN POWER COMPANY
Respondents.

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APPENDIX N

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. 98-1843 (DWF/AJB)

[Filed December 23, 1999]

Patrick Roedler; Thomas McDonough; Jeannie Strobel; Richard Palmer; Noreen Hoft; and HJ Company,

Plaintiffs,

v.

United States Department of Energy; the Secretary of the Treasury of the United States; and the United States of America,

Defendants,

and

Northern States Power Company,

Nominal Defendant.

John A. Cochrane, Esq., Cochrane & Bresnahan, 24 East Fourth Street, St. Paul, Minnesota, 55101; Brian B. O'Neill, Esq., Elizabeth H. Schmiesing, Esq., Faegre & Benson, 90 South Seventh Street, Suite 2200, Minneapolis, Minnesota 55402; and Rodney A. Wilson, Esq., Wilson Law Office, 701 Fourth Avenue South, Suite 500, Minneapolis, Minnesota 55415, for Plaintiffs.

Jack Kaufman, Esq., United States Department of Justice, P.O. Box 875, Ben Franklin Station, Washington, D.C., 20044, for Defendants United States Department of Energy, the Secretary of the Treasury of the United States, and the United States of America.

Timothy R. Thornton, Esq., Briggs & Morgan, 80 South Eighth Street, Suite 2400, Minneapolis, Minnesota 55402, for Nominal Defendant Northern States Power Company.

Julia E. Anderson, Assistant Attorney General, Minnesota Attorney General's Office, 445 Minnesota Street, St. Paul, Minnesota 55101, for Amici Minnesota Public Utilities Commission and Minnesota Department of Public Service.

JUDGES: DONOVAN W. FRANK, Judge of United States District Court.

OPINION BY: DONOVAN W. FRANK

MEMORANDUM OPINION AND ORDER

Introduction

This case arises under the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C.A. § 10101, *et seq.* Specifically, the lawsuit focuses on a contract between Defendant United States Department of Energy ("DOE") and Nominal Defendant Northern States Power Company ("NSP"), under which DOE is obligated to dispose of NSP's spent nuclear fuel in exchange for fees paid by NSP to DOE. The Plaintiffs and putative class members are ratepayers of NSP who allege that they are entitled to damages and other equitable relief from DOE, the Secretary of the Treasury of the United States, and the United States of America (collectively, the "Federal Defendants") for DOE's breach of the contract.

The matter is currently before the Court on the Federal Defendants' Motion to Dismiss the Plaintiffs' Complaint and NSP's Motion to Dismiss the Plaintiffs' Complaint or for Summary Judgment. Due to the status of discovery, a motion for summary judgment is premature, and the motions to dismiss the Plaintiffs' Complaint will be treated as motions to dismiss. The matter is also before the Court pursuant to the Federal Defendants' Motion to Dismiss NSP's Crossclaim. NSP concedes that if the Plaintiffs' Complaint is dismissed, then NSP's Crossclaim is moot.

The Minnesota Public Utilities Commission ("MPUC") and the Minnesota Department of Public Service (collectively, the "State Agencies") filed a joint amici brief in support of the Defendants' motions to dismiss. The State Agencies request that the Court dismiss the Plaintiffs' lawsuit in deference to the MPUC's jurisdiction over the rates charged by NSP

and in recognition of and deference to the ability of the State Agencies to protect ratepayers' interests.

For the reasons stated below, the Court does not have subject matter jurisdiction over the present litigation, and the Plaintiffs otherwise fail to state a claim for which relief may be granted. Therefore, the Federal Defendants' and NSP's Motions to Dismiss are granted. NSP's Crossclaim is thus moot and is dismissed also.

Background

In 1982, Congress enacted the NWPA to protect the public health and the environment from the potential risks associated with radioactive waste. 42 U.S.C.A. § 10131(a). The NWPA assigns to the federal government the responsibility to provide for the permanent disposal of spent nuclear fuel, and it directs that "the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel." 42 U.S.C. § 10131(a)(4). *Northern States Power Company v. United States*, 43 Fed. Cl. 371, 376 (Fed.Cl. 1999). The NWPA provides that the generators and owners of spent nuclear fuel have the responsibility to provide for and pay the costs of the interim storage of the spent nuclear fuel until the waste is accepted by DOE. 42 U.S.C.A. § 10131(a)(5).

The NWPA authorized DOE to enter into contracts with owners and generators of spent nuclear fuel, pursuant to which DOE is to accept and dispose of the spent nuclear fuel in exchange for the payment of fees from the owners and generators. 42 U.S.C.A.

§ 10222(a)(1). DOE regulations set forth a "Standard Contract" form to be used by DOE in entering into these contracts. 10 C.F.R. § 961.11. Under the contracts, the owners and generators are to pay statutorily imposed fees to DOE, in return for which DOE would dispose of the spent nuclear fuel, "beginning not later than January 31, 1998." 42 U.S.C.A. § 10222(a)(5)(b).

The NWPA also established the Nuclear Waste Fund ("NWF"), "composed of payments made by the generators and owners of such waste and spent fuel." 42 U.S.C.A. §§ 10131(b)(4), 10222(c). The Secretary of the Treasury is the custodian of the NWF. 42 U.S.C.A. § 10222(c). The NWPA specifies that expenditures may only be made from the NWF for administrative and operation purposes having a direct bearing upon radioactive waste disposal activities. 42 U.S.C.A. § 10222(d). The Plaintiffs allege that DOE has earned interest on the funds in the NWF from their placement in interest-bearing accounts by the United States Treasury and that NSP's payments alone have earned over $90 million in interest through 1997. (Complaint at ¶ 48.)

In June of 1983, DOE executed three virtually identical contracts with NSP (collectively, the "NSP Standard Contract") for the disposal of NSP's spent nuclear fuel, using the Standard Contract form set forth in 10 C.F.R. § 961.11. (Complaint at ¶ 12.) Article VIII of the NSP Standard Contract requires NSP, as "Purchaser," to pay DOE 1.0 mill per kWh of energy generated by nuclear means by the facility named in the contract. The 1.0 mill per kWh fee was statutorily mandated by the NWPA. 42 U.S.C.A. § 10222(a)(2).

NSP funds this fee through a line item charge on its ratepayers' monthly electricity bills. (Complaint at ¶ 47.)

DOE failed to begin accepting the spent nuclear fuel by January 31, 1998, and as yet, has not begun accepting any spent nuclear fuel. (Complaint at ¶ 40.)

DOE's breach has already been judicially determined in two cases brought under the NWPA. In 1995, DOE published a Notice in the Federal Register, setting forth its conclusion that it did not have an obligation to begin accepting spent nuclear fuel for disposal beginning January 31, 1998, absent the existence of a repository or interim storage facility by that date. 60 Fed. Reg. 21793 (May 3, 1995).

The United States Court of Appeals for the District of Columbia Circuit disagreed, holding that the NWPA created an unconditional obligation in DOE, reciprocal to the utilities' obligation to pay the fees into the NWF, to start disposing of the spent nuclear fuel no later than January 31, 1998. *Indiana Michigan Power Co. v. Dept of Energy,* 88 F.3d 1272, 1276 (D.C. Cir. 1996). The Court of Appeals held that a determination of the appropriate remedy was premature at that time, however, as DOE had not yet defaulted upon its statutory or contractual obligations. *Indiana Michigan,* 88 F.3d at 1277.

Following the *Indiana Michigan* decision, various state regulatory agencies and utilities, including NSP, petitioned the court for a writ of mandamus requiring DOE to begin disposing of the spent nuclear fuel by the statutory and contractual deadline of January 31,

1998. While the Court of Appeals reaffirmed that DOE had a clear duty to act and the petitioners had a clear right to relief, the Court of Appeals declined to issue the broad writ of mandamus sought because the petitioners had an adequate remedy under the Standard Contracts. *Northern States Power Co. v. United States Dept. of Energy,* 128 F.3d 754, 759 (D.C. Cir. 1997).

On June 6, 1998, prior to the Plaintiffs' filing of this lawsuit, NSP filed a complaint in the United States Court of Federal Claims against the United States, seeking monetary relief for the United States' breach of the NSP Standard Contract. *Northern States Power Co. v. United States,* 98-484C (Fed. Cl.). On April 6, 1999, the Court of Federal Claims granted the United States' motion to dismiss for failure to exhaust the administrative remedies set forth in the NSP Standard Contract. *Northern States Power Co. v. United States,* 43 Fed. Cl. 374, 388 (1999).

On August 7, 1998, the Plaintiffs commenced the present litigation. The Plaintiffs and putative class members are utility customers, or ratepayers, of NSP. (Complaint at ¶ 14.) The Plaintiffs' Complaint is set forth as follows: Count One, Breach of Contract; Count Two, Breach of Implied Contract; Count Three, Taking, Pursuant to the Tucker Act; Count Four, Unjust Enrichment; Count Five, Fifth Amendment Taking and Due Process; and Count Six, Declaration of NSP's Interest, seeking a declaration that NSP has no title to the funds it has collected from the Plaintiffs and an injunction against further collections.

The Plaintiffs do not allege any wrongdoing by NSP and seek no monetary relief against NSP, but rather have named NSP as a "Nominal Defendant."

Discussion

A. Standard of Review

In the present matter, the Federal Defendants have moved for dismissal, while NSP has moved for dismissal or, in the alternative, for summary judgment. The Plaintiffs argue that NSP's motion is properly considered as a motion for summary judgment, due to the parties' introduction of matters outside the pleadings. The Plaintiffs further argue that consideration of a summary judgment motion would be premature, due to the status of discovery.

The Court agrees that a motion for summary judgment is premature. However, the Court finds that the matter is capable of resolution as a motion to dismiss.

The Defendants move for dismissal pursuant to both Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6).

Dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) will not be granted lightly. *Wheeler v. St. Louis Southwestern Ry. Co.*, 90 F.3d 327, 329 (8th Cir. 1996), citing *Bowe v. Northwest Airlines, Inc.*, 974 F.2d 101, 103 (8th Cir. 1992), *cert. denied*, 507 U.S. 992, 113 S.Ct. 1602, 123 L.Ed.2d 164 (1993). Dismissal is proper, however, where an attack on the complaint's alleged basis for subject matter

jurisdiction reveals that there is no actual basis for jurisdiction. *Wheeler,* 90 F.3d at 329, citing *Bowe,* 974 F.2d at 103.

The district court has authority to consider matters outside the pleadings when subject matter jurisdiction is challenged under Rule 12(b)(1). *Osborne v. U.S.,* 918 F.2d 724, 728 n. 4 (8th Cir. 1990), citing *Land v. Dollar,* 330 U.S. 731, 735 & n. 4, 67 S.Ct. 1009, 1011 & n. 4, 91 L.Ed. 1209 (1947). Consideration of matters outside the pleadings under such circumstances does not convert the proceedings to a Rule 56 summary judgment motion. *Osborne,* 918 F.2d at 729.

A complaint shall be dismissed for failure to state a claim under Rule 12(b)(6) only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would demonstrate an entitlement to relief. *Springdale Educ. Assn. v. Springdale School Dist.,* 133 F.3d 649, 651 (8th Cir. 1998); *Parnes v. Gateway 2000, Inc.,* 122 F.3d 539, 545 (8th Cir. 1997), citing *Fusco v. Xerox Corp.,* 676 F.2d 332, 334 (8th Cir. 1982). Dismissal is proper only when the complaint on its face reveals "some insuperable bar to relief." *Duffy v. Landberg,* 133 F.3d 1120, 1122 (8th Cir. 1998), quoting *Frey v. City of Herculaneum,* 44 F.3d 667, 671 (8th Cir. 1995).

The allegations in the complaint must be treated as true and must be construed in the plaintiff's favor. *Duffy,* 133 F.3d at 1122. However, conclusory allegations of law and unwarranted inferences of fact do not suffice to support a claim. *Bradley v. Chiron Corp.,* 136 F.3d 1317, 1322 (Fed. Cir. 1998).

In deciding a motion to dismiss under Rule 12(b)(6), the court may consider matters of public record. *Sebastain v. U.S.*, 185 F.3d 1368, 1374 (Fed. Cir. 1999). In addition, the court may generally consider documents integral to the complaint and upon which the complaint relies, even when not attached to the complaint and produced instead by the defendant in support of a motion to dismiss. *Brogren v. Pohlad,* 933 F.Supp. 793, 798 (D. Minn. 1995). In the present matter, the NSP Standard Contract is referenced in the Complaint and is integral to and provides the basis of the Plaintiffs' claims. The Court may therefore consider the NSP Standard Contract and matters of public record without converting the present motions to dismiss into motions for summary judgment.

B. Sovereign Immunity and Subject Matter Jurisdiction

Under the doctrine of sovereign immunity, the United States is immune from suit unless it consents to be sued. *Miller v. Tony and Susan Alamo Foundation,* 134 F.3d 910, 915, (8th Cir. 1998). Waivers of the federal government's sovereign immunity must be unequivocally expressed in statutory text. *Miller,* 134 F.3d at 915. The United States' consent to be sued must be strictly construed in favor of the sovereign. *U.S. v. Nordic Village, Inc.,* 503 U.S. 30, 34, 112 S.Ct. 1011, 1014-15, 117 L.Ed.2d 181 (1992). In the absence of a waiver of sovereign immunity, the court lacks subject matter jurisdiction. *F.D.I.C. v. Meyer,* 510 U.S. 471, 475, 114 S.Ct. 996, 1000, 127 L.Ed.2d 308 (1994); *Miller,* 916 F.3d at 915-16.

In the present matter, the Plaintiffs pursue their contract and taking claims, set forth in Counts One, Two, Three, and Five, under the Tucker Act, 28 U.S.C.A. § 1346(a)(2). The Plaintiffs seek to pursue their due process claim under Section 702 of the Administrative Procedure Act, 5 U.S.C.A. § 702. In addition, the Plaintiffs seek injunctive and declaratory relief, set forth in Count Six, under the Declaratory Judgment Act, 28 U.S.C.A. §§ 2201-02, and the All Writs Act, 28 U.S.C.A. § 1651. The Plaintiffs have conceded to dismissal of Count Four, Unjust Enrichment. (Pl. Mem. in Opp., p. 45, n. 19.)

The Tucker Act provides that the district courts shall have jurisdiction over any "civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States . . . ." 28 U.S.C.A. § 1346(a)(2).[1] In the present matter, the Plaintiffs seek monetary damages for breach of contract, breach of implied contract, and for unlawful taking under the Fifth Amendment.

C. Count One: Breach of Contract

The Tucker Act provides a basis for jurisdiction in the district courts for breach of contract claims under

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[1] As the Tucker Act waives sovereign immunity only for claims "against the United States," the Plaintiffs' claims under the Tucker Act may not proceed against DOE or the Secretary of the Treasury of the United States.

$10,000. 28 U.S.C.A. § 1346(a)(2). *Ysasi v. Rivkind,* 856 F.2d 1520, 1525 (Fed. Cir. 1988). The Tucker Act also extends its grant of jurisdiction to claims brought by plaintiffs who are not named parties to, but rather are intended third party beneficiaries of government contracts. *Carlow v. United States,* 40 Fed. Cl. 773, 779 (Fed. Cl. 1998). In the present matter, the Plaintiffs claim that they are intended third party beneficiaries of the NSP Standard Contract.

1. Third Party Beneficiaries

The test for determining an intended third party beneficiary status is that the contract must reflect the express or implied intention of the parties to benefit the third party. *Montana v. United States,* 124 F.3d 1269, 1273 (Fed. Cir. 1997). The intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended to be benefitted thereby. *Montana,* 124 F.3d at 1273. The test is premised upon the decision of the United States Supreme Court, which held that "[b]efore a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement to which he is not a party, he must, at least, show that it was intended for his direct benefit. *Carlow,* 40 Fed. Cl. at 781, quoting *German Alliance Ins. Co. v. Home Water Supply Co.,* 226 U.S. 220, 230, 33 S.Ct. 32, 35, 57 L.Ed. 195 (1912).

When construing the intended benefit pursuant to a contract based on a federal statute, the court should look to the pertinent statutes and regulations and the underlying policy behind the contracts and applicable statutes and regulations. *See Busby School of Northern*

Cheyenne Tribe v. U.S., 8 Cl.Ct. 596, 602 (Cl. Ct. 1985) ("the plaintiffs in question may very well be able to show they were intended third-party beneficiaries of the contracts between the School Board and the BIA given the pertinent statutes and regulations and the underlying policy behind the contracts and applicable statutes and regulations").

In the present matter, not only is the NSP Standard Contract itself lacking in any mention of ratepayers such as the Plaintiffs, but the statute and regulations in question are similarly devoid of any reference to ratepayers as an intended beneficiary. Instead, the NSP Standard Contract and the NWPA, with its accompanying regulations, refer only to intended obligations and benefits between DOE and the owners and generators of spent nuclear fuel, and to an intention to benefit and protect the general public welfare and the environment.

The NWPA contains an explicit statement of its purposes. 42 U.S.C .A. § 10131(b). Included in its purposes is "a reasonable assurance that *the public and the environment* will be adequately protected from the hazards posed by high-level radioactive waste and such spent nuclear fuel . . . ." 42 U.S.C.A. § 10131(b)(1) (emphasis added). The NWPA further specifies that "the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel." 42 U.S.C.A. § 10131(a)(4).

In accordance with its purposes, the NWPA authorized DOE "to enter into contracts with any person who generates or holds title to high-level radioactive waste, or spent nuclear fuel," such as NSP.

42 U.S.C.A. § 10222(a). The NWPA further authorized DOE to establish procedures for the collection and payment of fees from the generators and owners of the spent nuclear fuel. 42 U.S.C.A. § 10222(a)(4). The NWPA does not authorize DOE to contract with ratepayers such as the Plaintiffs in any capacity.

The funds at issue in the present matter, contained in the NWF, are explicitly described in the NWPA as being "composed of payments made by the generators and owners of such waste and spent fuel, that will ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel."42 U .S.C.A. §§ 10131(b)(4). The NWPA specified that the fees and funds at issue are generated from utilities such as NSP, not from ratepayers such as the Plaintiffs.

In summary, the purpose of the NWPA is explicitly set forth as an intent to benefit and protect the public welfare and the environment. The NWPA and the corresponding regulations consistently and explicitly emphasize that the NWF fees will be paid by and the full costs of disposal will be borne by the owners and generators of the spent nuclear fuel. Ratepayers, such as the Plaintiffs, are not referenced in the statute or its accompanying regulations, either in regard to the benefits or the obligations contained in the NWPA.

Similarly, the NSP Standard Contract, entered into pursuant to the NWPA, is explicitly between DOE and NSP only; the ratepayers are not referenced, either in regards to the benefits or the obligations at issue. The

preamble of the NSP Standard Contract reads as follows:

> Whereas, the DOE has the responsibility for the disposal of spent nuclear fuel and high-level radioactive waste of domestic origin from civilian nuclear power reactors *in order to protect the public health and safety, and the environment;*
>
> . . .
>
> Whereas, all costs associated with the preparation, transportation, and the disposal of spent nuclear fuel and high-level radioactive waste from civilian nuclear power reactors shall be borne by the owners and generators of such fuel and waste;
>
> . . . .

(NSP Standard Contract, p. 1.)

The NSP Standard Contract sets forth, in Article VIII, that NSP, as "Purchaser," is required to pay DOE a fee of 1.0 mill per kWh on electricity. The NSP Standard Contract charges fees only to NSP and to no other person or entity. In exchange for payment of the fee, Article IV sets forth that DOE will accept title to NSP's spent nuclear fuel.

Finally Section XXII of the NSP Standard Contract contains an integration clause, which states that the contract "contains the entire agreements between the parties with respect to the subject matter hereof. Any representation, promise, or condition not incorporated in this contract shall not be binding on either party.

No course of dealing or usage of trade or course of performance shall be relevant to explain or supplement any provision contained in this contract."

Neither the NWPA nor the NSP Standard Contract reflects the express or implied intention to benefit the ratepayers as third parties. Rather, the statute and the contract explicitly contemplate that the parties' mutual obligations were entered into so as to benefit the general public as a whole.

The Plaintiffs cite to the legislative history in an attempt to create a question as to Congress' intent to benefit the ratepayers. However, where the resolution of a question of federal law turns on a statute and the intention of Congress, the court must first look to the statutory language. *Toibb v. Radloff*, 501 U.S. 157, 162, 111 S.Ct. 2197, 2200, 115 L.Ed.2d 145 (1991). The court will then look to the legislative history if the statutory language is unclear; however, if the statutory language is not unclear, there is no need to look at the legislative history. *Toibb*, 501 U.S. at 162, 111 S.Ct. at 2200. The Court has looked to the explicit language of the NWPA and has found no such intention to benefit the ratepayers specifically. There is consequently no need to look at legislative history so as to create an ambiguity that does not otherwise exist.

Similarly, the Plaintiffs also cite to public statements by NSP in an attempt to create a question about the parties' intent to benefit ratepayers under the NSP Standard Contract. However, a court's interpretation of a contract begins with the contract's plain language. *McAbee Construction, Inc. v. United*

States, 97 F .3d 1431, 1435 (8th Cir. 1996). If the provisions are clear and unambiguous, they must be given their plain and ordinary meaning, and the court may not resort to extrinsic evidence to interpret them. *McAbee,* 97 F.3d at 1435. Extrinsic evidence will not be received to change the terms of a contract that is clear on its face. *McAbee,* 97 F.3d at 1435, quoting *Beta Sys., Inc. v. United States,* 838 F.2d 1179, 1183 (Fed. Cir. 1988). The Court examined the language of the NSP Standard Contract and found no ambiguity that would require the introduction of extrinsic evidence. The Plaintiffs were not intended third party beneficiaries of the NSP Standard Contract.

As discussed above, the general rule for determining whether a plaintiff is an intended third party beneficiary is whether the contract reflects the express or implied intention of the parties to benefit the third party. *Montana,* 124 F.3d at 1273. However, under certain limited circumstances, the third party beneficiary test has a second prong.[2] *Schuerman v. U.S.,* 30 Fed. Cl. 420, 430 (Fed. Cl. 1994); *Montana,* 124 F.3d at 1273, n. 6. The second prong of the third party beneficiary test applies in cases in which members of the public bring suit against promisors who contract with the government to render a public service or, in other words, in cases of general government contracts benefitting the public at large. *Schuerman,* 30 Fed. Cl. at 430; *Montana,* 124 F.3d at

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[2] The second prong was rejected as per se requirement of third party beneficiary status, and currently only applies under limited circumstances. *Carlow,* 40 Fed. Cl. at 781; *Schuerman,* 30 Fed. Cl. at 430; *Montana,* 124 F.3d at 1273, n. 6.

1273, n. 6. In such cases, the third party beneficiary test requires direct evidence in the contract that the contracting parties intended to give the third party an enforceable right to sue for compensation. *Schuerman,* 30 Fed. Cl. at 430; *Montana,* 124 F.3d at 1273, n. 6.

In the present matter, the NSP Standard Contract is a government contract benefitting the public at large, as discussed above. Therefore, the second prong of the third party beneficiary test applies. The NSP Standard Contract must contain direct evidence that NSP and DOE intended to give the Plaintiff ratepayers an enforceable right to sue for compensation. There can be no question that the Plaintiffs fail to meet this test as a matter of law.

The Plaintiffs fail to meet either prong of the third party beneficiary test as a matter of law. Therefore, regardless of whether one or both prongs of the test are applied, the Plaintiffs are not third party beneficiaries of the NSP Standard Contract.

The Plaintiffs consequently fail to state a claim for breach of contract. In addition, because the Plaintiffs cannot sue under the NSP Standard Contract, there is no jurisdiction for breach of contract under the Tucker Act. Therefore, this Court does not have subject matter jurisdiction over the Plaintiffs' breach of contract claim and the claim must be dismissed.

2. Exhaustion of Administrative Remedies

In the alternative, the Plaintiffs' breach of contract claim must also be dismissed for failure to exhaust administrative remedies. The Plaintiffs allege that

they are third party beneficiaries under the NSP Standard Contract. (Complaint at ¶ 65.) The Court has already found that the Plaintiffs' allegation is erroneous as a matter of law. However, even if the Plaintiffs were third party beneficiaries under the Standard Contract, this Court would have to dismiss their claim of breach of contract for failure to exhaust administrative remedies.

A third party beneficiary is bound by the terms of the contract and is subject to the same defenses as the original party would be. *Robbins v. Prosser's Moving and Storage Co.*, 700 F.2d 433, 436 (8th Cir. 1983). In the present matter, Article XVI of the NSP Standard Contract provides that "any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer," whose decision shall be final and conclusive unless appealed to the DOE Board of Contract Appeals within 90 days. (NSP Standard Contract, p. 27; 10 C.F.R. § 961.11, Article XVI.)

The Court of Federal Claims cited to this language in the NSP Standard Contract in dismissing NSP's lawsuit against the United States; the Court held that NSP was required to pursue its claims through the administrative remedies established in the NSP Standard Contract. *Northern States Power Co. v. United States,* 43 Fed. Cl. at 382, 388. As a third party beneficiary, the Plaintiffs would be subject to the same defense in this lawsuit. Therefore, even if the Plaintiffs' claim of third party beneficiaries status under the NSP Standard Contract was not erroneous as a matter of law, their breach of contract claim

would still have to be dismissed for failure to exhaust administrative remedies.

C. Count Two: Breach of Implied Contract

In Count Two, the Plaintiffs allege that they are parties to an implied contract with DOE pursuant to the 1.0 mill per kWh fee paid into the NWF. (Complaint at ¶ 67.) In their Response Brief, the Plaintiffs specified that their breach of implied contract claim is based upon an implied-in-fact contract theory, and they are not pursuing their claim based upon an implied-in-law contract theory. (Pl. Mem. in Opp., p. 45, n. 19.) However, the Plaintiffs cannot set forth an entitlement to relief as a matter of law.

First, the existence of an express contract precludes the existence of an implied contract dealing with the same subject, unless the implied contract is entirely unrelated to the express contract. *Atlas Corp. v. United States,* 895 F.2d 745, 754 (Fed. Cir. 1990), *cert. denied,* 498 U.S. 811, 111 S.Ct. 46, 112 L.Ed.2d 22, citing *ITT Fed. Support Services v. United States,* 531 F .2d 522, 528, n. 12, 209 Ct. Cl. 157 (1976). In the present matter, the rights and duties in question, specifically, the payment of fees to DOE and DOE's corresponding obligation to accept spent nuclear fuel, are explicitly set forth in the NSP Standard Contract. Because the NSP Standard Contract already encompasses the subject matter of the Plaintiffs' claims, the Plaintiffs' breach of implied contract cause of action fails to state a claim as a matter of law.

In the alternative, the Plaintiffs cannot establish the elements of an implied contract as a matter of law. An implied-in-fact contract is one founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding. *Lewis v. United States,* 70 F.3d 597, 600 (Fed. Cir. 1995), quoting *Baltimore & Ohio R.R. Co. v. United States,* 261 U.S. 592, 597, 43 S.Ct. 425, 426-27, 67 L.Ed. 816 (1923). Like an express contract, an implied-in-fact contract requires: (1) mutuality of intent to contract; (2) consideration; and (3) lack of ambiguity in offer and acceptance. *Lewis,* 70 F.3d at 600, quoting *City of El Centro v. United States,* 922 F.2d 816, 820 (Fed. Cir. 1990), *cert. denied,* 501 U.S. 1230, 111 S.Ct. 2851, 115 L.Ed.2d 1019. When the United States is a party, a fourth requirement is added: the government representative whose conduct is relied upon must have actual authority to bind the government in contract. *Lewis,* 70 F.3d at 600, quoting *City of El Centro,* 922 F.2d at 820.

In the present matter, the Plaintiffs have failed to allege mutuality of intent to contract and lack of ambiguity in offer and acceptance. Rather, the Plaintiffs' Complaint, including the NSP Standard Contract, and the NWPA establish that DOE and NSP contracted with each other for NSP's payment of fees to DOE in exchange for DOE's disposal of spent nuclear fuel.

In addition, the Plaintiffs cannot as a matter of law satisfy the fourth required element of an implied-in-fact, that of actual authority by the

government representative in question. The NWPA authorized DOE to contract "with any person who generates or holds title to high-level radioactive waste, or spent nuclear fuel, ..." 42 U.S.C.A. § 10222(a)(1). DOE thus had actual authority to enter into contracts with utilities such as NSP. The Plaintiffs cannot as a matter of law establish that DOE had actual authority to contract with ratepayers such as the Plaintiffs for the disposal of spent nuclear fuel. The Plaintiffs' inability to establish actual authority to contract by DOE serves as an insuperable bar to relief in the present matter.

Count Two, breach of implied contract, thus fails to state a claim as a matter of law. Furthermore, without the existence of an implied contract, this Court lacks subject matter jurisdiction under the Tucker Act. Count Two must consequently be dismissed.

D. Count Three and Count Five: Taking and Violation of Due Process

In Count Three, the Plaintiffs assert that "DOE's actions constitute a taking without just compensation, and therefore compensation is available under the Tucker Act, ..." (Complaint at ¶ 69.) However, the Tucker Act is only a jurisdictional statute; it does not create any substantive rights. *Tippett v. United States,* 185 F.3d 1250, 1254 (Fed. Cir. 1999), citing *United States v. Testan,* 424 U.S. 392, 398, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976).

In Count Five, the Plaintiffs' assert that "DOE's actions constitute a taking of plaintiffs' and putative class members' property without due process of law,

. . . ." pursuant to the Fifth Amendment. (Complaint at ¶ 73.) Therefore, the Court will assume that the Plaintiffs intend to assert both a due process and a taking claim under the Fifth Amendment.

1. Taking under the Fifth Amendment

Pursuant to a taking claim under the Fifth Amendment, a plaintiff must initially show standing. *Maniere v. United States,* 31 Fed. Cl. 410, 420 (Fed. Cl. 1994). Standing is the constitutional requirement, imposed by the "cases or controversies" provision of Article III, that a plaintiff must allege a judicially cognizable and redressable injury in order to pursue a lawsuit. *Ben Oehrleins v. Hennepin County,* 115 F.3d 1372, 1378 (8th Cir. 1997).

To establish standing pursuant to a taking claim, the plaintiff must show proof of personal injury, that is, the requisite interest in the property at issue and the deprivation thereof by the United States. *Maniere,* 31 Fed. Cl. at 420. Accordingly, to demonstrate the requisite interest in the property at issue, the plaintiff must demonstrate ownership of the property at the time of the taking. *Maniere,* 31 Fed. Cl. at 420. If the plaintiff fails to establish this most basic requirement of the personal injury component of the standing analysis, a court need not progress to the other considerations of standing. *Maniere,* 31 Fed. Cl. at 420.

The Plaintiffs cannot demonstrate ownership of the property at issue, which are the fees that NSP paid into the NWF, and thus have no standing to pursue a taking claim. The Plaintiffs concede that they simply paid their monthly electricity bills. Revenue paid by

the customers for service belongs to the company. *Board of Public Utility v. New York Telephone Co.*, 271 U.S. 23, 31, 46 S.Ct. 363, 366, 70 L.Ed. 808 (1926). By paying bills for service, customers do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. *Board of Public Utility*, 271 U.S. at 32, 46 S.Ct. 366. The Plaintiffs in the present matter pay a fee for utility service, including the storage and disposal of spent nuclear fuel. The Plaintiffs thus do not retain an interest in the fee after it is paid to NSP. The Plaintiffs therefore lack standing to assert a taking claim. *See also Ben Oehrleins*, 115 F.3d at 1379-81 (no standing for customers based upon paying the fees in question through passed-on costs).

The Plaintiffs respond in the present matter by arguing that the fees paid into the NWF are not merely passed on to customers through increased utility bills, but rather, "the Plaintiffs here actually pay the fees in question to the United States, albeit *through the agency* of NSP. (Pl. Mem. in Opp., p. 25 (emphasis added).) The Plaintiffs thus argue that "NSP effectively acted as DOE's agent with respect to collection of the NWF fees." (Pl. Mem. in Opp., p. 51.) The Plaintiffs argue that "NSP had *apparent authority* to act as DOE's agent." (Pl. Mem. in Opp., p. 51 (emphasis added).)

However, "[i]t is well established that the government is not bound by the acts of its agents beyond the scope of their *actual authority*." *Harbert / Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1432 (Fed. Cir. 1998) (emphasis added), citing *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380,

384, 68 S.Ct. 1, 3, 92 L.Ed. 10 (1947). The Plaintiffs do not allege, and cannot as a matter of law establish, that NSP had actual authority to collect fees as DOE's agent.

Therefore, because the Plaintiffs cannot establish that they had the required ownership interest in the fees at the time that they were collected by DOE into the NWF, the Plaintiffs have no standing to pursue their takings claim.

In the alternative, even if the Plaintiffs had standing to pursue a taking claim based upon the NSP's payment of fees into the NWF, the Plaintiffs' taking claim would still be barred.

A compensable taking arises only if the government action in question is authorized. *Del-Rio Drilling Programs, Inc. v. United States,* 146 F.3d 1358, 1362 (Fed. Cir. 1998), citing *United States v. North Am. Transp. & Trading Co.,* 253 U.S. 330, 333, 40 S.Ct. 518, 64 L.Ed. 935 (1920). If the government action is unauthorized, the acts of the government's officers may be enjoinable, but they do not constitute the basis of a taking claim. *Del-Rio,* 146 F.3d at 1362. The principle underlying this rule is that when a government official engages in ultra vires conduct, the official will not, in any legal or constitutional sense, represent the United States, and what the official does or omits to do, without the *authority of Congress,* cannot create a claim against the government founded upon the Constitution. *Del-rio,* 146 F.3d at 1362 (emphasis added), citing *Hooe v. United States,* 218 U.S. 322, 31 S.Ct. 85, 54 L.Ed. 1055 (1910).

In the present matter, the NWPA authorized DOE to contract with NSP for the disposal of spent nuclear fuel in exchange for NSP's payment of fees. 42 U.S.C.A. § 10222(a)(1). DOE had no such "authority of Congress" to take any such fees from the Plaintiffs. Therefore, in the absence of the required "authority of Congress," the DOE's collection of fees from the Plaintiffs would be ultra vires, and thus could not form the basis of a taking claim.

2. Due Process

In Count Five, the Plaintiffs allege that the assessment of fees violates due process under the Fifth Amendment. (Complaint at ¶ 73 .) However, the due process clause of the Constitution is not a money-mandating provision such as is required for jurisdiction to lie under the Tucker Act. *Golden Pacific Bankcorp v. United States,* 15 F.3d 1066, 1076 (Fed. Cir. 1994). The Plaintiffs concede that their due process claim is not cognizable under the Tucker Act. (Pl. Mem. in Opp., pp. 53-54.)

The Plaintiffs seek instead to pursue their due process claim under Section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C.A. § 702, which was not pled in their Complaint. The Plaintiffs thus move the Court to allow them to amend their Complaint accordingly.

However, the Plaintiffs' due process allegation otherwise fails to state a claim for relief. The due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action. *O'Bannon v. Town Court Nursing Center,* 447

U.S. 773, 789, 100 S.Ct. 2467, 2476, 65 L.Ed.2d 506 (1980). The provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. *O'Bannon,* 447 U.S. at 789, 100 S.Ct. at 2476. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. *O'Bannon,* 447 U.S. at 789, 100 S.Ct. at 2476.

As the Court addressed earlier, the government did not directly appropriate any funds from the Plaintiffs, only from NSP. Any allegation by the Plaintiffs that DOE directly assessed fees against the Plaintiffs is erroneous as a matter of law. Therefore, the Plaintiffs' allegations fail to state a claim for violation of due process.

In addition, as the second element of a due process claim, after demonstrating that the plaintiff has a protected liberty or property interest at stake, the plaintiff must prove that the defendant deprived him or her of such an interest without due process of law. *Gordon v. Hansen,* 168 F.2d 1109, 1114 (8th Cir. 1999). Due process requires adequate notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Marler v. Missouri State Board of Optometry,* 102 F.3d 1453, 1456 (8th Cir. 1996), quoting *Post v. Harper,* 980 F.2d 491, 493 (8th Cir. 1992). In the present matter, the Plaintiffs have not alleged that the government deprived them of notice or an opportunity to be heard. Thus the Plaintiffs have not set forth a claim that they were deprived of due process of law under the Fifth Amendment.

Finally, it is well established that a simple breach of contract does not rise to the level of a constitutional deprivation. *Dover Elevator Co. v. Arkansas State Univ.*, 64 F.3d 442, 446 (8th Cir. 1995) (due process claim under § 1983 and Fourteenth Amendment). In the present matter, the Plaintiffs' due process allegation is based upon DOE's breach of the NSP Standard Contract. The Plaintiffs have alleged no additional facts that would give rise to a due process claim. The Plaintiffs' allegation therefore does not state a claim for a violation of due process.

For the above reasons, the Plaintiffs' allegations are insufficient to set forth a claim either for taking or for violation of due process under the Fifth Amendment. Therefore, Count Three and Count Five must be dismissed as a matter of law.[3]

3. Statute of Limitations

In the alternative, even if the Plaintiffs' taking and due process allegations stated a claim for relief, the Plaintiffs' claims would still be barred by the statute of limitations.

The NWPA contains a statute of limitations as follows:

> A civil action for judicial review described under subsection (a)(1) of this section may be

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[3] The Plaintiffs' motion to amend the Complaint to plead their due process claim under the APA is consequently denied as moot and untimely.

> brought not later than the 180th day after the date of the decision or action or failure to act involved, as the case may be, except that if a party shows that he did not know of the decision or action complained of (or of the failure to act), and that a reasonable person acting under the circumstances would not have known, such party may bring a civil action not later than the 180th day after the date such party acquired actual or constructive knowledge of such decision, action, or failure to act.

42 U.S.C.A. § 10139(c).

Subsection (a)(1), as referenced above, includes any civil action "challenging the constitutionality of any decision made, or action taken, under any provision of this part." 42 U.S.C.A. § 10139(a)(1)(C).[4] In Count Three and Count Five, the Plaintiffs allege that DOE's collection of fees pursuant to the NWPA, 42 U.S.C.A. § 10222(a), constitutes a taking and a violation of due process under the Fifth Amendment, in the context of DOE's failure to fulfill its corresponding obligation to begin accepting spent nuclear fuel by January 31, 1998.

Therefore, as the Plaintiffs seek to challenge the constitutionality of DOE's action taken under the

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[4] The statute also provides that the United States courts of appeals shall have original and exclusive jurisdiction over any such action. 42 U.S.C.A. § 10139(a)(1). The provision thereby provides an additional and distinct basis for the Court's conclusion that it lacks subject matter jurisdiction over the present matter.

NWPA, the Plaintiffs' claims are subject to the 180 day statute of limitations set forth above. DOE failed to fulfill its obligation to begin accepting spent nuclear fuel by January 31, 1998. (Complaint at ¶ 40.) The Plaintiffs commenced the present action on August 7, 1998, thereby filing their action after the limitations period had run.

E. Count Four: Unjust Enrichment

A claim for unjust enrichment essentially states a claim for breach of an implied-in-law contract. *Nematollahi v. United States,* 38 Fed. Cl. 224, 235 (Fed. Cl. 1997), citing *Trauma Serv. Group, Ltd. v. United States,* 33 Fed. Cl. 426, 432 (Fed. Cl. 1995), *aff'd,* 104 F.3d 1321 (Fed. Cir. 1997). However, jurisdiction under the Tucker Act extends only to contracts either express or implied in fact, and not to claims on contracts implied in law. *Hercules, Inc. v. United States,* 516 U.S. 417, 423, 116 S.Ct. 981, 985, 134 L.Ed.2d 47 (1996), citing *Sutton v. United States,* 256 U.S. 575, 581, 41 S.Ct. 563, 565-66, 65 L.Ed. 1099 (1921).

Therefore, the Court lacks subject matter jurisdiction over the Plaintiffs' claim of unjust enrichment, and Count Four must be dismissed. The Plaintiffs conceded that they are not pursing their claim of unjust enrichment. (Pl. Mem. in Opp., p. 45, n. 19.)

F. Count Six: Declaration of Utility's Interest

In Count Six, the Plaintiffs seek a declaration that NSP has no title to the funds it has collected from the

Plaintiffs and an injunction against further collections. (Complaint at ¶ 75.) The Tucker Act, however, does not confer equity jurisdiction. *United States v. Woodall,* 12 F.3d 791, 793 (8th Cir. 1993), citing *United States v. Testan,* 424 U.S. 392, 397-98, 96 S.Ct. 948, 952-53, 47 L.Ed.2d 114 (1976). The Plaintiffs concede that the Tucker Act does not waive sovereign immunity for their claims for equitable relief. (Pl. Mem. in Opp., pp. 67-68.) Instead, the Plaintiffs seek to proceed under the Declaratory Judgment Act, 28 U.S.C.A. § 2201-2202, and the All Writs Act, 28 U.S.C.A. § 1651, and seek to amend their Complaint to proceed under the APA, 5 U.S.C.A. § 702.

First, to the extent that the Plaintiffs seek a declaration that NSP has no title to the funds it collects from the Plaintiffs, the Court has already found that the Plaintiffs' allegation is erroneous as a matter of law. As previously addressed, revenue paid by the customers for service belongs to the company, and by merely paying their utility bills, customers do not acquire any interest in the funds of the company. *Board of Public Utility,* 271 U.S. at 32, 46 S.Ct. at 366. When the Plaintiffs in the present matter pay their fees for utility service, including a fee for the storage and disposal of spent nuclear fuel, that fee then becomes the property of NSP, and the Plaintiffs no longer retain an interest in the fee after it is paid to NSP. To the extent that the Plaintiffs seek a declaration regarding title to funds in the NWF, on the other hand, the Plaintiffs have no standing to seek such a declaration and the Court has no jurisdiction over the subject matter, as previously discussed.

Secondly, to the extent that the Plaintiffs seek an "injunction against further collections," the Plaintiffs' claim must also be dismissed as a matter of law. There are two collections at issue in the present matter. First, NSP collects the fee from the Plaintiffs; second, DOE collects the fee from NSP.

To the extent that the Plaintiffs seek an injunction against the future collection of the fee in question by NSP, that claim may not proceed. As a preliminary matter, the Plaintiffs concede that they do not allege any wrongdoing by NSP and do not seek any recovery against NSP, but have merely named NSP as a Nominal Defendant. Nevertheless, to the extent that the Plaintiffs seek an injunction against NSP, the bar to that claim is discussed in further detail below.

In addition, the Plaintiffs cannot maintain an action for an injunction against the future assessment of fees by DOE, again, for reasons previously addressed in this Order. The Declaratory Judgment Act may allow individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 71, n. 15, 98 S.Ct. 2620, 2629, n. 15, 57 L.Ed.2d 595 (1978). However, as previously addressed, the Plaintiffs cannot maintain this claim against DOE in the present matter. First, the Plaintiffs lack standing because, as previously discussed, DOE does not assess the fee in question against the Plaintiffs. DOE collects the fee in question from NSP only, pursuant to the NSP Standard Contract and the NWPA. Furthermore, as previously addressed in

detail, the assessment of the fee in question does not constitute a taking under the Fifth Amendment.

Finally, the federal courts' power to exercise jurisdiction over declaratory judgment actions is discretionary. *Aetna Cas. and Sur. v. Jefferson Trust and Sav.*, 993 F.2d 1363, 1366 (8th Cir. 1993), citing *State Farm Mut. Auto. Ins. Co. v. Bonwell*, 248 F.2d 862, 865 (8th Cir. 1957). The Declaratory Judgment Act was an authorization, not a command; it gave the federal courts competence to make a declaration of rights, but it did not impose a duty to do so. *Public Affairs Assoc., Inc. v. Rickover*, 369 U.S. 111, 112, 82 S.Ct. 580, 582 7 L.Ed.2d 604 (1962).

A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest. *Rickover*, 369 U.S. at 112, 82 S.Ct. at 582. For the reasons stated above regarding the Court's jurisdiction, sovereign immunity, and the Plaintiffs' failure to otherwise state a claim, to the extent that the Court's power to exercise jurisdiction under the Declaratory Judgment Act is discretionary, the Court would otherwise decline to exercise jurisdiction in the present matter.

G. Filed Rate Doctrine and Primary Jurisdiction

In the alternative, to the extent that the Plaintiffs seek a refund or an injunction against the further collection of the fee in question by NSP, the Plaintiffs claims are barred by the filed rate doctrine and the doctrine of primary jurisdiction.

NSP is a "public utility," as defined in Minn. Stat. § 216B.02, subd. 4. Accordingly, NSP may only charge rates that have been approved by the MPUC, pursuant to Minn. Stat. §§ 216B.03 and 216B.16. A "rate" is defined as "every compensation, charge, fare, toll, tariff, rental and classification, or any of them, demanded, observed, charged, or collected by an public utility for any service and any rules, practices, or contracts affecting any such compensation, charge, fare, toll rental, tariff, or classification." Minn. Stat. § 216B.02, subd. 5.

The filed rate doctrine "has its genesis in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251-252, 71 S.Ct. 692, 695, 95 L.Ed. 912 (1951)." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962, 106 S.Ct. 2349, 2354-55, 90 L.Ed.2d 943 (1986). In *Montana-Dakota*, the Supreme Court held that the plaintiff, who had argued that the utility's rates were fraudulent and unlawful, "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, ..." *Montana-Dakota*, 341 U.S. at 251, 71 S.Ct. at 695. Ultimately, the Supreme Court held as follows:

> We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one.

Montana-Dakota, 341 U.S. at 251-52, 71 S.Ct. at 695.

The Eighth Circuit applied the filed rate doctrine in 1992, in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 954 F.2d 485 (8th Cir. 1992). In an action brought by customers against a telephone company, the Eighth Circuit affirmed the district court's dismissal, holding that the claims "necessarily and plainly challenge the rates previously approved by the Commission," and were thereby barred by the filed rate doctrine. *H.J. Inc,* 954 F.2d at 493.

The Plaintiffs claims are similarly barred in the present action. To the extent that the Plaintiffs seek a refund of any fee paid to NSP, and/or to the extent that the Plaintiffs seek an injunction against the further collection of any fee by NSP, the Plaintiffs claims are barred by the filed rate doctrine.

In the alternative, the primary jurisdiction doctrine will bar the Plaintiffs' claims. The primary jurisdiction doctrine is utilized to coordinate judicial and administrative decision making. *Access Telecommunications v. Southwestern Bell Telephone Co.,* 137 F.3d 605, 608 (8th Cir. 1998). The doctrine comes into play whenever enforcement of the claim at issue requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. *Atlantis Express, Inc. v. Standard Transportation Services, Inc.*, 955 F.2d 529, 532 (8th Cir. 1992), citing *United States v. Western Pac. R.R .*, 352 U.S. 59, 63-64, 77 S.Ct. 161, 164-65, 1 L.Ed.2d 126 (1956). There exists no fixed formula for determining whether to apply the doctrine of primary jurisdiction. *Access Telecommunications,* 137 F.3d at 608. Rather, in each case the question is whether the reasons for the doctrine are present and

whether applying the doctrine will aid the purposes for which the doctrine was created. *Access Telecommunications,* 137 F.3d at 608. These reasons include promotion of uniformity in statutory and regulatory construction and utilization of the agency's specialized knowledge. *Atlantis Express,* 955 F.2d at 532. Additionally, application of the doctrine is appropriate when policy considerations are at issue. *Atlantis Express,* 955 F.2d at 532-33.

The purposes behind the doctrine of primary jurisdiction are evident in the present matter. The matter implicates the utilization of a statutory and regulatory scheme so as to fund the permanent disposal of spent nuclear fuel. Deference to the MPUC in such a matter is appropriate.

Notwithstanding the primary jurisdiction doctrine, however, for all the reasons stated, the present matter may not proceed before this Court.

Conclusion

This lawsuit and related litigation around the nation have arisen pursuant to an unfortunate reality. Spent nuclear fuel exists and, notwithstanding DOE's obligations under the NWPA, no permanent repository has been built. However, the present lawsuit is not the appropriate remedy for the ill. The present lawsuit ignores the fact that spent nuclear fuel has already been generated by NSP, and the funds that have been collected in the NWF are required to provide for permanent disposal.

NSP is currently responsible for the interim storage of the spent nuclear fuel; DOE remains responsible for its ultimate disposal. The Plaintiffs, however, have no such responsibility. If the putative class prevailed, the Plaintiffs would disgorge the NWF, but NSP and DOE would still be responsible for the spent nuclear fuel with no funds to provide for its disposal. A refund would therefore give rise to the need for future rate increases to finance the permanent disposal of the nuclear waste already produced, thus passing the cost on to future ratepayers.

Finally, the NSP Standard Contract pertains to the rights and obligations between NSP and DOE only. NSP pays its statutory fees into the NWF as a matter of law. The fact that NSP may fund this payment through a charge to the Plaintiffs' electricity bills neither affords this Court with jurisdiction over the present matter, nor entitles the Plaintiffs to the forms of relief they seek.

For the reasons stated, **IT IS HEREBY ORDERED:**

1. The Federal Defendants' Motion to Dismiss (Doc. No. 43) is **GRANTED**.

2. NSP's Motion to Dismiss, or in the Alternative, for Summary Judgment (Doc. No. 42) is **GRANTED**.

3. The Plaintiffs' Complaint is **DISMISSED WITH PREJUDICE**.

4. The Federal Defendants' Motion to Dismiss NSP's Crossclaim (Doc. No. 56) is **GRANTED**.

5. NSP's Crossclaim is **DISMISSED WITH PREJUDICE**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 23, 1999

/s/
DONOVAN W. FRANK
Judge of United States District Court

APPENDIX O

COURT OF APPEALS OF MICHIGAN

Docket Nos. 259845, 264099, 264131, 264156, 264191

[Filed July 3, 2007]

In re Application of Detroit Edison Company; Attorney General,
Appellant,

v.

Michigan Public Service Commission, Detroit Edison Co., and Constellation Newenergy, Inc.,
Appellees.

In re Application of Detroit Edison Company; Detroit Edison Company,
Appellant,

v.

Michigan Public Service Commission, Association of Businesses Advocating Tariff Equity, Michigan Environmental Council, Public Interest Research Group in Michigan, Constellation Newenergy, Inc., and

Attorney General,
Appellees.

In re Application of Detroit Edison Company;
Michigan Environmental Council and
Public Interest Research Group,
Appellants,

v.

Michigan Public Service Commission, Detroit
Edison Co., and Constellation Newenergy, Inc.,
Appellees.

In re Application of Detroit Edison Company;
Association of Businesses Advocating
Tariff Equity,
Appellant,

v.

Michigan Public Service Commission,
Detroit Edison Co., Energy Michigan, Inc.,
Constellation Newenergy, Inc., and
Attorney General,
Appellees.

In re Application of Detroit Edison Company;
Attorney General,
Appellant,

v.

Michigan Public Service Commission,
Detroit Edison Co., Energy Michigan, Inc.,

Constellation Newenergy, Inc., and Association of Businesses Advocating Tariff Equity,
Appellees.

Submitted Feb. 21, 2007, at Lansing.
Decided July 3, 2007, at 9:10 a.m.

The Detroit Edison Company filed an application in the Public Service Commission to increase its electricity rake and reinstate its power supply cost recovery (PSCR) plan, as well as for approval of a regulatory asset recovery surcharge, implementation of a mitigation adjustment mechanism, approval of an earnings sharing mechanism, termination of its securitization and transition charges for choice customers, and authorization to use excess securitization savings to recover its stranded costs. The PSC issued an interim order that required Edison to reinstate its PSCR clause, then granted in part and denied in part Edison's request for relief. The PSC also ruled that Edison had the authority to charge its customers to subsidize the costs of its renewable energy program. After granting in part Edison's petition for rehearing, the PSC reaffirmed the bulk of its holdings, and Edison, the Attorney General, the Michigan Environmental Council (MEC) and the Public Interest Research Group In Michigan (PIRGIM), and the Association of Businesses Advocating Tariff Equity (ABATE) separately appealed various aspects of the PSC's rulings. The Court of Appeals consolidated the appeals.

The Court of Appeals *held:*

1. The PSC's order authorizing Edison to impose new surcharges on residential customers during a period in which the Legislature had capped rates at a reduced level was not unlawful or unreasonable because the surcharges were offset by decreases in other rates, which resulted in no overall rate increase.

2. The PSC's decision to allow Edison to recover transmission costs is within the PSC's broad ratemaking authority and consistent with the governing statutory language, previous PSC decisions, and applicable caselaw.

3. The PSC's order requiring Edison's customers to provide funding for the low-income and energy-efficiency fund (LIEEF) that will not be used in Edison's service territory is not unlawful because the statutory language that created the LIEEF referred to it in the singular and did not limit the use of a utility's funds to that utility's own service territory.

4. The PSC lacked the statutory authority to empower Edison to impose an additional monthly charge on all its customers whose rates were not capped in order to subsidize the cost of Edison's voluntary renewable energy program.

5. The PSC's decision not to reduce Edison's short-term debt or increase its working capital so that Edison's base rate would equal its liabilities was not unlawful or unreasonable. The PSC was entitled to use a six-month rather than a 12-month average to calculate Edison's short-term debt, and was also

entitled to rely on the evidence provided by its staff despite the existence of contradictory evidence.

6. Edison is entitled to recover its share of the control premium its parent company paid to acquire another energy company, despite the fact that the company was in financial distress, because the merger resulted in cost savings. Because allowing Edison to amortize its recovery of the control premium over a 40-year period is too speculative, Edison must substantiate its savings in its next rate case.

7. Edison did not show by clear and convincing evidence that the PSC's decision not to adjust the test year for an additional year of inflation when using data from the year 2002 that were adjusted for inflation for 2003 and 2004, when the PSC did not release its final order until November 2004, was unlawful or unreasonable; the PSC has the discretion to allow a test year not to coincide precisely with the year that rates are implemented.

8. The issues related to spent nuclear fuel raised by MEC and PIRGIM were already raised and decided by this Court in a previous case; therefore, these claims are barred under the doctrine of collateral estoppel.

9. The PSC acted within its broad ratemaking authority in adopting a transitional power supply rate tariff that applied only to customers with whom Edison had entered into special manufacturing contracts in light of the rate shock that those customers would experience if subjected to regular tariff rates and the possibility that they would leave Edison's service entirely as a result. Contrary to

ABATE's assertion, the PSC's decision on this issue was based on sufficient evidence in the record.

10. The PSC correctly concluded that it should treat Edison's request for establishment of a PSCR base and factors as having been brought under MCL 460.6j(3) through (7), despite the fact that Edison's application cited MCL 460.6j(18), because the PSC had determined that Edison's PSCR clause was automatically reinstated and Edison filed a separate PSCR plan case for 2005.

Affirmed in part and reversed in part.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Susan I. Leffler* and *Donald E. Erickson*, Assistant Attorneys General, for the Attorney General.

Dykema Gossett P.L.L.C. (by *Albert Ernst, Stewart A. Binke,* and *Christine Mason Soneral*), Lansing, for the Public Service Commission.

Bruce R. Maters, Jon P. Christinidis, Richard P. Middleton, and *Michael J. Solo, Jr.*, and *Foster, Swift, Collins & Smith, P.C.* (by *William K. Fahey* and *Stephen J. Rhodes*), Detroit, Lansing, for the Detroit Edison Company.

Clark Hill P.L.C. (by *Don L. Keskey*), Lansing, for the Michigan Environmental Council and the Public Interest Research Group in Michigan.

Clark Hill P.L.C. (by *Robert A.W. Strong* and *Thomas E. Maier*), Lansing, for the Association of Businesses Advocating Tariff Equity.

Before: MARKEY, P.J., and SAAD and WILDER, JJ.

SAAD, J.

I. INTRODUCTION

On June 20, 2003, the Detroit Edison Company (Edison) filed its application for an increase in its rate schedules that govern the distribution and supply of electric energy. The hearings before the Public Service Commission (PSC) were extensive.[1] And, as the PSC noted, the proceedings before it were "among the most complex cases ever considered by the Commission."[2] Indeed, as the PSC opined in its November 23, 2004, opinion and order, this case "affects not only the operations of the utility, but also the finances of over two million of its residential and business customers in

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[1] The PSC noted that the documents contained in the docket of this case encompass nearly 13,000 pages of testimony, exhibits, comments, and pleadings. See *In re Application of Detroit Edison Co.*, opinion and order of the Public Service Commission, issued November 23, 2004, 2004 WL 2672285, (Case No. U-13808) (November 23, 2004, order), p. 4 n. 4.

[2] *In re Application of Detroit Edison Co.*, order of the Public Service Commission, issued November 4, 2003, 2003 WL 22512003 (Case No. U-13808), p. 8.

ways that no proceeding brought before this agency has ever done."[3]

Many of the issues decided by the PSC in this rate case have not been appealed by any party,[4] but

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[3] November 23, 2004,order, *supra* at 1.

[4] As part of this rate case, the PSC: (1) concluded that use of the staff's proposed 2004 test year, which was based on the historical 2002 year adjusted for inflation and other measurable changes, was reasonable and appropriate because that year was based on known and measurable facts, whereas Edison's proposed 2004 test year, which was fully projected and based on proposed operating plans, budgets, and capital acquisitions, was based on assumptions as well as proposals that had not been approved by management; (2) accepted the staff's recommended base rate of $7,123,560,000 for Edison, finding that that rate was reasonable because it was based on the 2002 historical test year adjusted for various known factors; (3) accepted the staff's proposed capital structure of 54 percent debt and 46 percent equity; (4) rejected Edison's request that it be allowed to recover $61.6 million of the control premium paid to acquire MCN Energy; (5) found that Edison's operation and maintenance (O & M) expenses should be reduced by $45,359,000 and rejected Edison's assertion that because of the age of its generation fleet, its O & M expenses would outstrip inflation in the coming years; (6) rejected Edison's assertion that the 2002 historical figures, adjusted for inflation for 2003 and 2004, should be adjusted for an additional year of inflation; (7) rejected Edison's request to recover $9.4 million in costs incurred during 2000 and 2001 to divest transmission assets, an action taken as a step toward complying with MCL 460.10w(1), and instead adopted the staff's position that the costs, which were incurred when Edison transferred transmission assets to an affiliate in preparation for sale of those assets to a third party, should be treated as an offset to the sale price in determining the premium realized from the sale; (8) adopted the staff's proposed

those issues appealed by Edison, the Attorney General, the Michigan Environmental Council and the Public Interest Research Group in Michigan (MEC/PIRGIM), and the Association of Businesses Advocating Tariff Equity (ABATE), were fully explored at a special three-hour hearing before this Court on February 21, 2007, wherein all parties presented their respective positions.

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transitional power supply rate (TPSR) tariff to be applied to contracts into which Edison entered with certain large manufacturing customers, but rejected the argument that all large manufacturing customers should be allowed to take service under the TPSR tariff; (9) affirmed that rate caps permitted netting rate reduction against rate increases to achieve rate adjustments, as long as the overall rate paid by customers did not increase; (10) emphasized that it had not rejected Edison's application to establish a PSCR factor under MCL 460.6j(18); (11) determined that all PSCR issues not addressed in the order could be raised in the 2004 PSCR reconciliation filing; (12) approved the inclusion of $39,858,000 in O & M costs to fund the low-income and energy efficiency fund (LIEEF), but rejected Edison's and the AG's assertion that the funds should be used only to serve low-income customers in its service territory; (13) found that the hearing referee correctly concluded that issues regarding spent nuclear fuel (SNF) should not be considered in the instant proceeding because related issues had been addressed in other proceedings; (14) found that the PSC had statutory authority under MCL 460.10b(1) and (6) to require Edison to establish a renewable energy program (REP) and concluded that Edison should do so; and (15) found that Edison should raise revenue to cover any shortfall in the amounts received under the REP by implementing a five-cent per meter, per billing cycle surcharge on all customers whose rates are no longer capped.

In Docket Nos. 259845, 264099, 264131, and 265156, the Attorney General of Michigan (AG), Edison, MEC/PIRGIM, and ABATE appeal the PSC's November 23, 2004, order regarding Edison's application for a rate increase. In Docket No. 264191, the AG appeals from the PSC's order of June 30, 2005, granting in part and denying in part Edison's petition for rehearing. These appeals have been consolidated for purposes of hearing and decision. We affirm in part and reverse in part.

II. FACTS AND UNDERLYING PROCEEDINGS

The Michigan Legislature enacted 2000 PA 141, the Customer Choice and Electricity Reliability Act (Act 141), MCL 460.10 *et seq.*, as part of its decision to restructure and deregulate the electric utility industry in Michigan. *Attorney General v. Pub. Service Comm.*, 249 Mich.App. 424, 426, 642 N.W.2d 691 (2002). Among other things, Act 141 reduced rates and imposed caps on the rates that an electric utility could charge its customers. MCL 460.10d provides in pertinent part:

> (1) Except as otherwise provided under subsection (3) or unless otherwise reduced by the commission ... the commission shall establish the residential rates for each electric utility with 1,000,000 or more retail customers in this state as of May 1, 2000[5] that will result in a 5% rate reduction from the rates that were authorized or in effect on May 1, 2000.

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[5] Edison is such a utility.

> Notwithstanding any other provision of law or commission order, rates for each electric utility with 1,000,000 or more retail customers established under this subsection become effective on June 5, 2000 and remain in effect until December 31, 2003 and all other electric retail rates of an electric utility with 1,000,000 or more retail customers authorized or in effect as of May 1, 2000 shall remain in effect until December 31, 2003.
>
> (2) On and after December 31, 2003, rates for an electric utility with 1,000,000 or more retail customers in this state as of May 1, 2000 shall not be increased until the earlier of December 31, 2013 or until the commission determines, after notice and hearing, that the utility meets the market test under [MCL 460.10f] and has completed the transmission expansion provided for in the plan required under [MCL 460.10v]. The rates for commercial or manufacturing customers of an electric utility with 1,000,000 or more retail customers with annual peak demands of less than 15 kilowatts shall not be increased before January 1, 2005. There shall be no cost shifting from customers with capped rates to customers without capped rates as a result of this section. In no event shall residential rates be increased before January 1, 2006 above the rates established under subsection (1).

Edison's rates had not been comprehensively reviewed and set by the PSC since 1994, before Act 141 was enacted. Because of an expressed need to increase

its rates and in anticipation of the expiration of the Act 141 caps, on June 20, 2003, Edison filed an application for a general rate case to increase its rates[6] and to implement a power supply cost recovery (PSCR)[7] plan and five-year forecast. MCL 460.6j(18) permits an electric utility to conduct a PSCR proceeding in the context of a general rate case. Edison sought an increase in its rates on both an interim and a permanent basis, approval of a regulatory asset recovery surcharge, reinstatement of its PSCR clause, a determination of its stranded costs,[8] implementation

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[6] A "general rate case" is "a proceeding initiated by a utility in an application filed with the commission that alleges a revenue deficiency and requests an increase in the schedule of rates or charges based on the utility's total cost of providing service." MCL 460.6a(2)(b).

[7] A utility is entitled to recover the reasonable costs incurred in generating electricity. A "PSCR clause" is "a clause in the electric rates or rate schedule of a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices." MCL 460.6j(1)(a). The PSC "may incorporate a [PSCR] clause in the electric rates or rate schedule of a utility, but is not required to do so." MCL 460.6j(2).

[8] The PSC has defined "stranded costs" as costs incurred during an era of regulation that are above market prices and costs associated with the transition to competitive markets. Stranded costs include: "(1) regulatory assets, consisting of unrecovered costs of demand-side management programs and other similar

of a mitigation adjustment mechanism, approval of an earnings-sharing mechanism, termination of its securitization and transition charges for choice customers, and authorization to use excess securitization savings to recover stranded costs.

The PSC entered interim orders on December 18, 2003, and February 20, 2004, that required Edison to reinstate its PSCR clause as of January 1, 2004,[9] and granted Edison interim relief in the amount of $248,430,000, respectively.

On November 23, 2004, the PSC granted in part and denied in part Edison's request for relief.[10] In an order entered on June 30, 2005, the PSC granted Edison's petition for rehearing in part and denied it in part.[11] The PSC reaffirmed its holdings regarding Edison's capital structure, rate base, and

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costs, (2) capital costs of nuclear plants, (3) contract capacity costs arising from power purchase agreements, (4) employee retraining costs, and (5) costs related to the implementation of restructuring." *Consumers Energy Co. v. Pub. Service Comm.*, 268 Mich.App. 171, 181, 707 N.W.2d 633 (2005).

[9] In *Detroit Edison Co. v. Pub. Service Comm.*, unpublished opinion per curiam of the Court of Appeals, issued October 4, 2005 (Docket No. 252966), another panel of this Court affirmed the PSC's decision.

[10] The hearing referee conducted extensive hearings in April 2004. Those hearings generated 3,329 pages of transcript and 235 exhibits.

[11] Other parties also sought rehearing of the PSC's November 23, 2004, order.

capitalization; denied Edison's request to include the control premium paid in the acquisition of MCN in Edison's rates; and reaffirmed its holdings regarding the adjustment for inflation of the base rate and the availability of the low-income and energy efficiency fund (LIEEF) for customers throughout the state. More specifically, regarding Edison's assertion that the PSC rejected its PSCR proposal pursuant to MCL 460.6j(18), the PSC concluded that it should treat Edison's request for PSCR reinstatement and establishment of a PSCR base as having been raised under MCL 460.6j(3) through (7), which provide for the filing of annual PSCR plan and reconciliation cases.

III. STANDARD OF REVIEW

The standard of review for PSC orders is narrow and well-defined. Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Michigan Consolidated Gas Co. v. Pub. Service Comm.*, 389 Mich. 624, 635-636, 209 N.W.2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich. 396, 427, 596 N.W.2d 164 (1999). And, of course, an order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc. v. Pub. Service Comm.*, 377 Mich. 259, 279, 140 N.W.2d 515 (1966). In sum, a final order of the PSC

must be authorized by law and supported by competent, material, and substantial evidence on the whole record. Const. 1963, art. 6, § 28; *Attorney General v. Pub. Service Comm.*, 165 Mich.App. 230, 235, 418 N.W.2d 660 (1987).

Consistently with the law regarding appellate review of an administrative agency's decisions, we give due deference to the PSC's administrative expertise and will not substitute our judgment for that of the PSC. *Attorney General v. Pub. Service Comm. No. 2*, 237 Mich.App. 82, 88, 602 N.W.2d 225 (1999). Importantly, we "give great weight to any reasonable construction of a regulatory scheme that the PSC is empowered to administer, *"Champion's Auto Ferry, Inc. v. Pub. Service Comm.*, 231 Mich.App. 699, 708, 588 N.W.2d 153 (1998), but we may not abandon our responsibility to interpret statutory language and legislative intent. *Miller Bros. v. Pub. Service Comm.*, 180 Mich.App. 227, 232, 446 N.W.2d 640 (1989). Whether the PSC exceeded the scope of its authority is a question of law that we review de novo. *In re Complaint of Pelland Against Ameritech Michigan*, 254 Mich.App. 675, 682, 658 N.W.2d 849 (2003).

IV. ANALYSIS

A. AG's APPEAL IN DOCKET NO. 259845

1. IMPACT OF SURCHARGES

The PSC possesses only that authority granted to it by the Legislature. *Attorney General v. Pub. Service Comm.*, 231 Mich.App. 76, 78, 585 N.W.2d 310 (1998). The statutes that confer power on the PSC must be

strictly construed. Authority must be granted by clear and unmistakable language. Words and phrases in the PSC's enabling statutes must be read narrowly and in the context of the statutory scheme. See *Consumers Power Co. v. Public Service Comm.*, 460 Mich. 148, 155-159, 596 N.W.2d 126 (1999).

As part of its effort to deregulate the electric power industry, the Legislature provided relief to residential customers by reducing rates by 5 percent, freezing rates at that level until December 31, 2003, and capping rates at the reduced level until January 1, 2006. MCL 460.10d(1) and (2). In its November 23, 2004, order, the PSC authorized Edison to impose new surcharges on those customers during those periods, ruling that such surcharges were lawful because they were offset by reductions in other rates.

The AG argues that the PSC's order is unlawful and unreasonable because it violates the statutory prohibition against rate increases. Clearly, the imposition of a surcharge changes the rate charged to a customer. We note that MCL 460.10d(2) uses the plural term "rates." Yet, "every word importing the plural number may be applied and limited to the singular number." MCL 8.3b. The AG contends that because MCL 460.10d(2) does not use the term "total rate" or "total rates," the statute does not authorize the PSC to approve increases in some rates, even if those increases are offset by decreases in other rates. We reject this argument.

A general rate case, and this is a general rate case, seeks an increase in rates or charges based on the "total cost of providing service." MCL 460.6a(2)(b). The

PSC has broad authority to set just and reasonable rates and may, in the exercise of its discretion, determine what factors are relevant in a particular case. *Attorney General, supra,* 231 Mich.App. at 79, 585 N.W.2d 310; *Attorney General v. Pub. Service Comm. No. 1,* 133 Mich.App. 719, 725-726, 349 N.W.2d 539 (1984). The PSC is not bound by any particular ratemaking methodology, and can make pragmatic adjustments to respond to any particular circumstances in any given case. *Attorney General v. Pub. Service Comm.,* 189 Mich.App. 138, 148, 472 N.W.2d 53 (1991).

The AG contends that the term "rates" in MCL 460.10d(2) means each individual component of a rate charged by a utility, and that each component is capped under the statute. To accept this untenable assertion would mean that the PSC could not change a utility's rate under any circumstances during the period in which the rate was capped. Were we to accept the AG's position, such a ruling would undermine the PSC's broad ratemaking authority and contradict the plain language of MCL 460.10d(8), which provides: "Except as provided under subsection (3), until the end of the period in subsection (2), the commission shall not authorize any fees or charges that will cause the residential rate reduction required under subsection (1) to be less than 5%."The import of the language of MCL 460.10d(8) is that the PSC may authorize raises in individual components of a rate as long as the raises do not increase an overall rate above the (reduced) rate mandated by the Legislature as set forth in MCL 460.10d(1) and the capped rate mandated by MCL 460.10d(2). This construction avoids conflict among the statutes, and therefore

should and does control. *House Speaker v. State Admin. Bd.*, 441 Mich. 547, 568-569, 495 N.W.2d 539 (1993).

The PSC's decision to increase some rates while reducing others to avoid an overall increase is clearly within the PSC's broad ratemaking authority and discretion, and is a reasonable interpretation of the statutory scheme that it is empowered to administer. *Champion's Auto Ferry, supra.*[12]

2. TRANSMISSION EXPENSES

Our review of this issue begins with the pertinent statutory provision. MCL 460.6j provides in relevant part:

> (1) As used in this act:
>
> (a) "Power supply cost recovery clause" means a clause in the electric rates or rate schedule of a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the

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[12] The filed-rate doctrine holds that a public utility can claim no right to a rate other than the filed rate either fixed or accepted by the PSC. *Detroit Edison Co. v. Pub. Service Comm.*, 416 Mich. 510, 516, 331 N.W.2d 159 (1982). Contrary to the AG's assertion, the PSC's November 23, 2004, order does not violate the filed-rate doctrine. All charges imposed by Edison are reflected in filed tariffs.

> booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices.
>
> (b) "Power supply cost recovery factor" means that element of the rates to be charged for electric service to reflect power supply costs incurred by an electric utility and made pursuant to a power supply cost recovery clause incorporated in the rates or rate schedule of an electric utility.

The AG contends that the PSC's November 23, 2004, order is unlawful and unreasonable because it allows Edison to include transmission expenses in its PSCR clause. Transmission expenses are properly accounted for in a specific account established under the PSC's Uniform System of Accounts for Major and Nonmajor Electric Utilities. Mich. Admin. Code, R. 460.9001. The AG asserts that the PSC had no authority to allow Edison to recover costs through a PSCR clause if that recovery is not authorized by statute. *Attorney General, supra,* 231 Mich.App. at 78, 585 N.W.2d 310. We reject this position because it is contrary to the express language of the statute and would lead to absurd results.

To comply with MCL 460.10w(1), Edison sold its transmission assets to International Transmission Company (ITC), a member of Midwest Independent System Operators. Edison no longer owns transmission assets, and now purchases transmission

services pursuant to rates set by the Federal Energy Regulatory Commission (FERC).[13]

Neither subsection MCL 460.6j nor any accounting rule prohibits an adjustment to a PSCR clause to account for transmission costs. Obviously, power must be transmitted for it to be distributed to a utility's customers. Payments made by Edison for transmission costs, which are made to comply with federal law, are necessarily "transportation costs," and therefore are properly recoverable in a PSCR clause. MCL 460.6j(1)(a). The PSC's decision to allow Edison to recover transmission costs in its PSCR proceeding is (1) within the PSC's broad ratemaking authority, *Attorney General, supra,* 231 Mich.App. at 79, 585 N.W.2d 310; (2) consistent with the language of Act 304 in general and MCL 460.6j in particular, *Consumers Power Co., supra* at 157 n. 8, 596 N.W.2d 126, and, importantly, (3) consistent with the PSC's previous decisions and decisions of this Court.[14]

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[13] FERC has jurisdiction over the rates, charges, and rules and regulations pertaining to transmission services pursuant to various provisions of the Federal Power Act, 16 U.S.C. 824 *et seq.*

[14] See, e.g., *Michigan Environmental Council v. Pub. Service Comm.,* unpublished opinion per curiam of the Court of Appeals, issued May 11, 2004, 2004 WL 1058190, (Docket Nos. 244354, 246744), slip op. at 5-6. This decision lacks precedential authority, MCR 7.215(C)(1), but we consider its analysis persuasive because it reflects judicial adoption of the PSC's interpretation of a statute that the PSC is legislatively authorized to administer.

3. LIEEF: ASSISTANCE TO LOW-INCOME CUSTOMERS

In Act 141, the Legislature created the LIEEF and charged the PSC with administering the fund. MCL 460.10d(7) reads in pertinent part:

> If securitization savings exceed the amount needed to achieve a 5% rate reduction for all customers, then, for a period of 6 years, 100% of the excess savings, up to 2% of the electric utility's commercial and industrial revenues, shall be allocated to the low-income and energy efficiency fund administered by the commission. The commission shall establish standards for the use of the fund to provide shut-off and other protection for low-income customers and to promote energy efficiency by all customer classes.

In its interim order, the PSC acknowledged that upon the issuance of interim relief Edison would no longer have securitization savings, and therefore it approved the inclusion of $39,858,000 in Edison's operation and maintenance (O & M) costs to fund the LIEEF in 2004 and thereafter. In its November 23, 2004, order, the PSC concluded that those funds could be used throughout the state, not only to serve low-income customers in Edison's service territory.

The AG asserts that the PSC's November 23, 2004, order is unlawful and unreasonable because it requires Edison's customers to provide monies for the LIEEF that will not be used in Edison's service territory which serves no rational purpose. We disagree.

Relevant statutes refer to "the" LIEEF, which strongly suggests that the Legislature intended to create a single fund.[15] Moreover, no statutory language limits the use of a utility's funds to that utility's service territory. Further, the fact that only Edison and Consumers Energy had one million or more retail customers as of May 1, 2000, and thus were the only electric utilities required to reduce rates pursuant to MCL 460.10d(1) and (2), and so contribute securitization savings to the LIEEF, supports the PSC's conclusion that securitization savings contributed to the LIEEF by Edison and Consumers could be used throughout the state. Because the PSC's interpretation of the authorizing legislation is reasonable, it is entitled to deference. *Attorney General, supra,* 237 Mich.App. at 88, 602 N.W.2d 225;*Champion's Auto Ferry, supra.*

We also reject the AG's argument that the PSC's order should be reversed because, in the AG's view, the decision to fund the LIEEF through Edison's O & M costs is unwise. A court's function is simply to apply the public policy promulgated by the Legislature, not to rule on the wisdom of social policy.[16] *Hanson v. Mecosta Co. Rd. Comm'rs,* 465 Mich. 492, 504, 638 N.W.2d 396 (2002).

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[15] The use of the word "the" designates a definite object. See *Hashem v. Les Stanford Oldsmobile, Inc.*, 266 Mich.App. 61, 79, 697 N.W.2d 558 (2005).

[16] We do not mean to suggest by this that we in fact question the wisdom of this specific policy. Instead, we simply reiterate that this is not the judiciary's role.

4. FUNDING OF RENEWABLE ENERGY PROGRAM

The PSC maintains that MCL 460.10b(1) and MCL 460.10r(6) empower the PSC to grant Edison the authority to impose a charge of $0.05 a meter, each month, to pay for the cost of Edison's renewable energy program (REP). MCL 460.10b(1) authorizes the PSC to "establish rates, terms, and conditions of electric service that promote and enhance the development of" new energy technologies. MCL 460.10r(6) empowers the PSC to establish a REP designed to inform customers of the availability of and the value of using renewable power, to promote the use of existing sources of renewable power, and to encourage the development of new sources of such power.

The AG acknowledges that the Legislature authorized the PSC to establish a REP designed to achieve the aforementioned objectives. However, the AG argues here, as it successfully maintained in *Attorney General v. Pub. Service Comm.*, 269 Mich.App. 473, 713 N.W.2d 290 (2006), that the PSC lacked the statutory authority to empower Edison to impose an additional charge of $0.05 a meter each month on all customers (whose rates were not capped) to subsidize the cost of Edison's REP. We agree.

In *Attorney General v. Pub. Service Comm., supra,* 269 Mich.App. 473, 713 N.W.2d 290, another panel of this Court ruled that because neither MCL 460.10b(1) nor MCL 460.10r(6) specifically authorized the PSC to enable a utility to compel all customers to pay a

surcharge to support a voluntary REP, the PSC "exceeded its authority in concluding to the contrary":[17]

> We hold that the PSC lacked the statutory authority to authorize CEC to impose an additional charge of $0.05 a meter each month on all customers, including customers who had not agreed to pay a premium to receive green power, to finance the development of renewable resource power programs. The PSC established a renewable energy program, as required by MCL 460.10r(6). The PSC's authority to set rates that facilitate the development of new energy technologies is set out in MCL 460.10b(1); however, that authority does not include the power to make management decisions on behalf of a utility. *Union Carbide Corp. v. Pub. Service Comm.*, 431 Mich. 135, 148, 428 N.W.2d 322 (1988). The PSC's ability to consider a wide variety of factors when setting rates is well-established, *Detroit Edison Co. v. Pub. Service Comm.*, 221 Mich.App. 370, 375, 562 N.W.2d 224 (1997), but is not unlimited. MCL 460.10b(1) and MCL 460.10r(6) were enacted as part of CCERA [Act 141]. The Legislature clearly intended consumer participation in green power programs to be voluntary. Neither MCL 460.10b(1) nor MCL 460.10r(6) specifically authorizes the PSC to enable a utility to compel customers to pay to support a voluntary renewable resource energy

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[17] *Attorney General, supra*, 269 Mich.App. at 480-482, 713 N.W.2d 290.

> program even if they have not chosen to receive power from the program. The PSC exceeded its authority in concluding to the contrary. [*Attorney General, supra,* 269 Mich.App. at 481-482, 713 N.W.2d 290, citing *In re Complaint of Pelland, supra.*]

This case is controlling law[18] and therefore mandates our holding that the portion of the PSC's November 23, 2004, order that authorized Edison to impose a surcharge of $0.05 a meter each month on all customers is unlawful.[19] MCL 462.26(8). Accordingly, we reverse this part of the PSC's ruling.

B. EDISON'S APPEAL IN DOCKET NO. 264099

1. CALCULATION OF WORKING CAPITAL/SHORT-TERM DEPT

In order to calculate Edison's revenue requirements, the PSC had to determine the rate of return to be applied to Edison's base rate.[20] To do this,

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[18] MCR 7.215(J)(1).

[19] Indeed, our Supreme Court denied the PSC's appeal of our Court's holding and, on July 25, 2006, the PSC issued an order that implemented this Court's decision that the collection of a monthly charge of $0.05 a meter for green-power pilot costs is unlawful.

[20] The hearing referee found that Edison's base rate is $7.12 billion, and noted that at the time of the hearing, Edison had "about $3.5 billion in debt." Notice of Proposal For Decision at 14. Case No. U-11-13808.

the PSC had to determine Edison's capital structure as well as its cost of capital. The PSC rejected Edison's recommendation of a capital structure of 50 percent debt and 50 percent equity for the test year 2004 in favor of the staff's proposed structure of 54 percent debt and 46 percent equity. The PSC observed that the adoption of a 46 percent equity ratio presented a significant improvement over the 40 percent ratio approved in Edison's previous rate case, and served to balance the interests of Edison and its ratepayers.

The PSC found that Edison's long-term debt cost was 6.31 percent. The PSC rejected Edison's claim of short-term debt of $98.9 million at an interest rate of 2.30 percent, and instead agreed with the staff that Edison carried $279 million in short-term debt at an interest rate of 2.30 percent.

Edison argues that the PSC's November 23, 2004, order is unlawful and unreasonable because the PSC failed to reduce Edison's short-term debt or increase its working capital so that Edison's base rate, i.e., its assets, would equal its capitalization, i.e., its liabilities. Edison asserts that the PSC uses uniform accounting methods, MCL 460.556; *Attorney General v. Pub. Service Comm.*, 262 Mich.App. 649, 651, 658-659, 686 N.W.2d 804 (2004), and determined in a previous rate case that the balance sheet method must be used for determining a utility's base rate, including working capital, in a rate case.[21] However, by adopting

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[21] In *In re Proceedings on the Appropriate Methodology to be Used, for Ratemaking Purposes, in Determining Working Capital Allowance of Regulated Gas, Electric and Telephone Utilities in*

the staff's conclusion that Edison carried $279 million in short-term debt, the PSC found that Edison's total liabilities exceeded its assets by approximately $125 million. Edison asserts that its total working capital must be increased by $125 million, or in the alternative its short-term debt must be reduced by $125 million, so that total capitalization and total assets match. Making this adjustment would increase Edison's rates by $13.4 million. We disagree.

The staff used a six-month average to calculate Edison's short-term debt at $279 million, whereas Edison contended that a 12-month average should have been used to calculate the debt at $98.9 million. The PSC adopted the staff's method to calculate short-term debt on the ground that it was more reasonable. Edison disagrees with the PSC's conclusion, but, aside from referring to the order in a previous case, does not specify in what way the PSC's decision is unlawful, unreasonable, or not supported by the requisite evidence. Also, Edison's reliance on the

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Michigan, opinion and order of the Public Service Commission, issued June 11, 1985 (Case No. U-7350), the PSC investigated which method-the formula approach, the lead/lag method, or the balance sheet method-was most appropriate for determining a working capital allowance for ratemaking purposes. The PSC determined that the balance sheet method, which "is an analysis of all of the assets of the utility to determine which are used to provide service and an analysis of all utility liabilities to determine the extent to which assets are funded by capital that is tied to the earnings of the utility," *id.* at 4, was the "most appropriate and fairest method for determining a working capital allowance," and was "to be used for all rate cases filed after the date of this order." *Id.* at 12.

order in Case No. U-7350 is misplaced. That order addressed the appropriate methodology for determining a working capital allowance, but did not fix the appropriate methodology for determining short-term debt. Edison suggests that the PSC should have adopted its calculations rather than those offered by the staff; however, the PSC was entitled to rely on the evidence provided by the staff, notwithstanding the existence of contradictory evidence. See *Great Lakes Steel Div. of Nat'l Steel Corp. v. Pub. Service Comm.*, 130 Mich.App. 470, 481-482, 344 N.W.2d 321 (1983). Though this is a close question and we recognize that Edison's position has merit, because the total impact of the PSC's decision regarding Edison's base rate and capitalization is not unjust or unreasonable, and because we grant deference to the PSC, we will not interfere with the PSC's exercise of its discretion. See *Michigan Bell Tel. Co. v. Pub. Service Comm.*, 332 Mich. 7, 38-39, 50 N.W.2d 826 (1952).

2. RECOVERY OF CONTROL PREMIUM

As the PSC staff opined and the hearing referee recommended, we hold that the substantial savings to Edison customers are a direct result of the acquisition of Michigan Consolidated Gas Company (Mich.Con.) and that these synergistic savings fully justify the pass-through of the acquisition control premium. Edison seeks and is entitled to that portion of the control premium that permits Edison to accomplish these synergistic savings. We hold that Edison is clearly entitled to recover its share of the control premium that resulted in these synergistic savings. Like the hearing referee, we reject the arguments of the AG and MEC/PIRGIM in opposition to Edison's

rate request regarding the control premium. Of course, the PSC should determine the precise amount of the appropriate recovery and the period over which to amortize Edison's recovery of its portion of this control premium.

In May 2001, DTE, Edison's parent company, paid $2.48 billion to acquire MCN Energy, the parent company of MichCon. DTE paid a control premium of $894 million to acquire MCN.[22] DTE allocated 66 percent, or $589 million, of the control premium to Edison on the basis of the estimated synergistic savings, i.e., the savings that arose from increased efficiency resulting from the merger, to be realized by Edison, for the benefit of Edison's customers. Therefore, in this rate case, Edison sought to recover its portion of the control premium through amortization over a period of 40 years, and accordingly requested recovery of $61.6 million for the year 2004.

Though the hearing referee rejected Edison's request for $61.6 million, he recommended inclusion of $46.2 million in Edison's rates for 2004, which is the amount the PSC staff recommended. The PSC staff and the hearing referee both opined that the

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[22] A control premium, also known as an acquisition premium, is the difference between the purchase price and the market value of the acquired company immediately before the announcement of the acquisition. See *In re Application of Michigan Gas Co.*, order of the Public Service Commission, issued June 29, 1990 (Case No. U-9323), p. 19 n. 5. DTE paid $2.488 billion for MCN, a price that was $1.478 billion over MCN's book value. The difference between MCN's market value immediately before the announcement of the acquisition and the purchase price paid by DTE was $894 million.

synergistic savings fully justify Edison's recapture of its share of the control premium. The hearing referee concluded that Edison introduced substantial, unrebutted evidence of cost savings that resulted directly from the acquisition and merger that justified the pass-through of the control premium. Though holding that recovery is justified, the hearing referee nonetheless rejected Edison's request to recover the control premium over a 40-year amorization period because he opined, and we agree, that it would be too speculative to forecast savings over such a lengthy period. Therefore, the hearing referee concluded, and we hold, that Edison is required to substantiate savings in its next rate case in order to continue recovering the control premium.

The PSC determined, incorrectly in our view, that no part of the premium should be included in Edison's rates, and noted that DTE's decision to pay a premium for the acquisition of MCN was not subject to oversight and came at a time when MCN was in financial distress. Simply stated, these are not valid reasons to deny Edison the relief it seeks. The PSC's clearly erroneous decision resulted in a reduction of $46.2 million in Edison's revenue requirement for 2004, and a significant reduction of hundreds of millions in the future.

Edison maintains that the PSC's decision to disallow recovery of Edison's portion of the control premium is unlawful and unreasonable for three reasons. We agree. First, the decision ignored the substantial savings that resulted from the acquisition and merger, and, by denying recovery of the cost of the investment, denied Edison its right to earn a

reasonable rate of return on its investment in providing service. See, e.g., *Michigan Consolidated Gas Co., supra* at 640, 209 N.W.2d 210. Second, the PSC failed to apply the "net benefit" standard it articulated in a previous case[23] for determining whether Edison should be allowed to recover control premium costs. Edison's customers benefited from the acquisition in the form of lower costs resulting from acquisition-related cost savings. Third, the PSC ignored its own role in allowing the acquisition to go forward. The PSC approved a contract between Michigan Consolidated Gas Company and Exelon, a Chicago-based energy company, as a prerequisite to the Federal Trade Commission's approval of the acquisition. Thus, because the PSC was aware of the acquisition while it happened, and took no steps to register any objections, the PSC cannot now disavow its actions and deny Edison the benefit of the acquisition. See, e.g., *Consumers Energy Co. v. Pub. Service Comm. No. 2,* 261 Mich.App. 455, 459-460, 683 N.W.2d 188 (2004).

Edison also asserts that the PSC's decision is not supported by competent, material, and substantial evidence on the whole record. Again, we agree. The PSC purported to question why DTE paid a premium for a company that was in financial distress, but acknowledged that it had no basis to question the appropriateness of the acquisition or the price paid by DTE for MCN. Furthermore, record evidence showed that MCN's market value reflected the diminished financial position of the company, and that the

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[23] Case No. U-9323.

purchase price was within the range for comparable transactions. The PSC's conclusion that the acquisition provided no benefit to Edison's customers is simply unsupported by any record evidence. To the contrary, there is substantial evidence on the record that the acquisition resulted in a savings of $112.6 million in 2004. Indeed, Edison showed by clear evidence that if Edison were permitted to recover $61.6 million of the control premium, Edison's customers would realize more than $50 million in savings in 2004 alone.

Moreover, though DTE, not Edison, paid the control premium, we hold that that is not a sufficient reason to deny Edison recovery of its portion of the control premium. As the hearing referee noted, parent companies routinely incur costs and apportion those costs to subsidiaries. Further, the hearing referee properly found that Edison's customers recognized significant tangible benefits in the form of reduced expenses as a direct result of this merger. Therefore, we conclude that it is reasonable to allow Edison to recover its portion of the costs incurred to realize those savings. See *Michigan Bell Tel. Co., supra* at 21-22, 50 N.W.2d 826.[24]

Similarly, we hold that Edison is entitled to recover its allocated share of the control premium. Thus, we reverse that portion of the PSC's decision denying

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[24] We reject Edison's assertion that the PSC improperly disavowed the acquisition it had previously approved, at least implicitly. The PSC had no authority to approve the acquisition, *Consumers Power Co., supra* at 155, 596 N.W.2d 126, and had no role in doing so.

Edison's request to recover its allocated portion of the control premium and remand this matter to the PSC for further proceedings to establish the precise amount and timing of this recovery.

3. ADJUSTMENT OF TEST YEAR

Edison's application for a rate increase was based on a forecasted 2004 test year. The PSC rejected Edison's test year and adopted the staff's methodology of using a 2002 historical test year adjusted for inflation at the rate of 2 percent annually for both 2003 and 2004.

Edison notes that the PSC's final order was not released until November 2004, a full 17 months after Edison's application was filed,[25] which postponed the effect of the rate adjustments until the end of 2004. Edison contends that the PSC's failure to adjust the staff's 2004 test year for an additional year of inflation at 2 percent, which would have increased Edison's O & M expenses by $24.6 million, is unlawful and unreasonable. We disagree.

The proceeding before the PSC combined Edison's first general rate case in more than 10 years with Edison's request to reinstate its PSCR clause. A test year used to set rates need not coincide precisely with the year that such rates are implemented. *Detroit Edison Co. v. Pub. Service Comm.*, 127 Mich.App. 499,

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[25] MCL 460.6a(2) directed the PSC to decide the rate case within nine months, and MCL 460.6a(3) required the PSC to file reports explaining the reason for any delay beyond those nine months.

508, 342 N.W.2d 273 (1983). The establishment of the test year was within the PSC's discretion. There is no evidence that the PSC did not act with all appropriate dispatch. Edison has not shown by clear and satisfactory evidence that the PSC's decision not to adjust the test year for an additional year of inflation is unlawful or unreasonable. MCL 462.26(8).

C. MEC/PIRGIM's APPEAL IN DOCKET NO. 264131

We note at the outset of our analysis of MEC's and PIRGIM's appeal that these same plaintiffs challenged the PSC's identical determination regarding spent nuclear fuel (SNF) issues in *In re Application of Indiana Michigan Power Co.*, 275 Mich.App. 369, 738 N.W.2d 289 (2007). In Indiana, we rejected each and every legal challenge MEC and PIRGIM raise here. Therefore, for the reasons and on the grounds set forth in our decision in *Indiana* and under the doctrine of collateral estoppel, we reject all of plaintiff's arguments regarding the SNF-related issues and hold that the PSC properly rejected all of MEC/PIRGIM's SNF-related challenges.

D. ABATE's APPEAL IN DOCKET NO. 264156

1. SPECIAL MANUFACTURING CONTRACTS

Edison entered into special manufacturing contracts (SMCs) with large manufacturing customers, including General Motors Corporation, Ford Motor Company, and Chrysler Corporation. The PSC

approved the SMCs[26] and allowed Edison to offer service to these large customers at a rate below what they would have paid absent these contracts.

Over time, other utilities became able to offer service to these large customers at competitive rates. To avoid seeking recovery from other customers of a portion of the loss incurred from serving the large customers, Edison sought to recover at least a portion of the discounts by imputing the discounts into its rates. To avoid the PSC's disallowing recovery of the discounts, as the PSC had indicated it would, the staff recommended a transitional power supply rate (TPSR) tariff for former SMC customers. The staff's proposed tariff set rates midway between those charged under the SMCs and those in Edison's regular industrial tariffs. Edison and ABATE also proposed TPSR tariffs,

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[26] In its November 23, 2004, order, *supra* at 74-75, the PSC noted that in its orders approving the SMCs, Edison agreed that it

> would have the burden to demonstrate that either the prices of the special contract are justified on a cost of service basis, or that the benefits for other customers are substantial and outweigh the costs that are not recovered from the special contract customer. The Commission consistently affirmed that Detroit Edison's shareholders should expect to bear much if not all of any revenue shortfall that results from the special contracts.... In addition, the Commission has found that before any recovery related to these contracts, Detroit Edison would be required to demonstrate that service provided in conjunction with the contracts has not, and will not in the future, impede the development of competition in its service territory.

and ABATE proposed that all large manufacturing customers, and not just former SMC customers, be charged under the TPSR tariff.

In its November 23, 2004, order, the PSC adopted the staff's recommendation that the TPSR tariff be applied to former SMC customers only. The PSC found that the adoption of a TPSR tariff for former SMC customers only did not "violate the prohibition against discriminatory rates, as special contract customers differ in circumstance from those customers that have not been served under those contracts." The PSC reasoned that adoption of a TPSR tariff was "a rational method to mitigate the harm that other customers might endure should the special contract customers leave the system entirely."

ABATE sought a rehearing and challenged the PSC's decision to limit the applicability of the TPSR tariff to former SMC customers. In an order entered on June 30, 2005, the PSC denied the petition.

MCL 460.557(4) provides, in pertinent part:

> The rates of an electric utility shall be just and reasonable and a consumer shall not be charged more or less than other consumers are charged for like contemporaneous service rendered under similar circumstances and conditions. An electric utility doing business within this state shall not, directly or indirectly by a special rate, rebate, draw-back, or other device, charge, demand, collect, or receive from a person, partnership, or corporation, a greater or lesser compensation for a service rendered

> than the electric utility charges, demands, collects, or receives from any other person, partnership, or corporation for rendering, a like contemporaneous service.

ABATE argues that the PSC's adoption of a TPSR tariff limited to former SMC customers discriminates against other large manufacturing customers, and thus is unlawful under MCL 460.557(4). We disagree.

The PSC has broad ratemaking authority. See MCL 460.6. The PSC is not bound by any single ratemaking formula, and may make pragmatic adjustments when warranted by the circumstances of the particular matter before it. *Detroit Edison Co., supra,* 221 Mich.App. at 373-375, 562 N.W.2d 224. Rate design is legislative in nature, and we will not disturb a rate-design decision absent a showing that the decision is arbitrary, capricious, or an abuse of discretion. *Id.* at 381, 562 N.W.2d 224.

The PSC determined that in light of the rate shock that the SMC customers would experience if subjected to regular tariff rates and the possibility that these customers might therefore leave Edison's service entirely, thereby depriving Edison of a significant portion of its revenues,[27] the implementation of a

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[27] In an order approving the SMCs for General Motors, Ford, and Chrysler, the PSC noted that the automotive facilities covered by the contracts accounted for 9 percent of Edison's retail electric revenues. Furthermore, the evidence showed that extending the TPSR tariff to all large manufacturing customers would have decreased Edison's revenues by $10 million a year.

TPSR tariff was a pragmatic solution. Edison rendered service to customers covered by SMCs "under similar circumstances and conditions" that differed from the conditions under which it rendered service to other large manufacturing customers and the PSC's decision to limit the applicability of the TPSR tariff to SMC customers continued this practice. The TPSR tariff conforms to MCL 460.557(4) in that it treats all SMC customers the same and applies the same ratemaking methodology to each of these customers.

ABATE's reliance on *City of Ishpeming v. Pub. Service Comm.*, 370 Mich. 293, 121 N.W.2d 462 (1963), as support for its position that the PSC erred by limiting the applicability of the TPSR tariff to SMC customers, is misplaced. In that case, the Upper Peninsula Power Company (UPPC) eliminated four separate tariffs being charged for similar service in a 10-county area, and implemented an area uniform rate. The city of Ishpeming had a contract with a successor to the UPPC, and pursuant to that contract, received electric power at a lower rate than that charged under the UPPC's new uniform tariff. The city sought to set aside the PSC's order that the UPPC implement a uniform tariff for the area. Our Supreme Court held that the PSC's order was valid, noting that the PSC "had a right and duty to eliminate discrimination" under MCL 460.557 as the statute read at that time. *Id.* at 302,121 N.W.2d 462.

The *Ishpeming* Court's decision that the city was not entitled to continue receiving power at its former rate was based on the finding that no evidence showed that the city was entitled to rate disparities or differentials that had been in place before

implementation of the uniform rate. *Id.* at 312, 121 N.W.2d 462. Here, there is simply no evidence that all large manufacturing customers would experience the same rate shock as would the SMC customers upon returning to Edison's regular tariff rates. The PSC was within its ratemaking authority to address this discrepancy by limiting the applicability of the TPSR tariff to SMC customers. *Detroit Edison Co., supra,* 221 Mich.App. at 373-375, 562 N.W.2d 224. The PSC's decision to limit the applicability of the TPSR tariff to SMC customers did not violate MCL 460.557(4), and the PSC's order is not unlawful. *In re MCI Telecom. Complaint, supra* at 427, 596 N.W.2d 164.

2. SUFFICIENCY OF THE EVIDENCE

A decision of the PSC must be supported by competent, material, and substantial evidence on the whole record, and must include findings of fact and conclusions of law that allow for appellate review. Const. 1963, art. 6, § 28; MCL 24.285. ABATE argues that the PSC's decision adopting the TPSR tariff violates Const. 1963, art. 6, § 28, MCL 24.285, and the doctrine of due process in that it is not based on competent, material, and substantial evidence on the whole record. ABATE asserts that the PSC cited no evidence to support its finding that limiting the applicability of the TPSR tariff to SMC customers did not violate MCL 460.557(4). We disagree.

The record in this case consists of more than 3,200 pages of transcript and more than 230 exhibits. To require the PSC to have set out in exhaustive detail the rationale behind every issue before it would have required the PSC to produce an opinion and order of

unmanageable length and complexity. The PSC's discussion of the parties' competing proposals regarding implementation of a TPSR tariff was based on sufficient evidence in the record, and the PSC stated adequate reasons for its decision.

E. AG's APPEAL IN DOCKET NO. 264191

MCL 460.6j(18) provides in pertinent part:

> Notwithstanding any other provision of this act, the commission may, upon application by an electric utility, set power supply cost recovery factors, in a manner otherwise consistent with this act, in an order resulting from a general rate case.... If the commission sets power supply cost recovery factors in an order resulting from a general rate case:
>
> (a) The power supply cost recovery factors shall cover a future period of 48 months or the number of months which elapse until the commission orders new power supply cost recovery factors in a general rate case, whichever is the shorter period.
>
> (b) Annual reconciliation proceedings shall be conducted pursuant to subsection (12) and if an annual reconciliation proceeding shows a recoverable amount pursuant to subsection (15), the commission shall authorize the electric utility to defer the amount and to accumulate interest on the amount pursuant to subsection (16), and in the next order resulting from a general rate case authorize the utility to recover

the amount and interest from its customers in the manner provided in subsection (15).

(c) The power supply cost recovery factors shall not be subject to revision pursuant to subsection (10).

In its application for a general rate case filed with the PSC on June 20, 2003, Edison requested interim and final rate relief, and also made the following request with respect to its PSCR clause:

11. Applicant is requesting, pursuant to Act 304, CL460.6j(18), that the Commission reinstate the Company's PSCR mechanism for 2004 in this case, coincident with approval of the Company's request for a mitigation adjustment to operate in tandem with the PSCR mechanism. Because it is imperative that the Company's overall revenue deficiency be considered in tandem with the reinstatement of the 2004 PSCR mechanism, Applicant requests that the PSCR clause remain suspended and that implementation of a new factor not begin until the date of the Commission order authorizing adequate and compensatory relief for the Company.

12. As stated above, Applicant requests the reinstatement of the proposed PSCR mechanism and mitigation adjustment for the period commencing with the later of January 1, 2004, or the issuance of a Commission order granting the Company's request for adequate and compensatory relief, through December 31,

> 2004; and subsequently, through a separate PSCR Plan and factor for the 12-month period January 1, 2005, through December 31, 2005. Pursuant to the provisions of Act 304, each PSCR factor and plan established in this case will be subject to the annual reconciliation procedures, as referenced in MCL 460.6j(18), to be conducted in this docket.

Paragraph 12 of Edison's application contained the following footnote:

> As part of this proposal, Applicant is requesting that in the event a Commission order granting the necessary rate relief occurs subsequent to January 1, 2004, that the remaining months in 2004 be considered the first partial PSCR reconciliation period. Thereafter beginning with 2005, PSCR reconciliation would occur on a calendar year basis.

The PSC issued interim orders that held that Edison's PSCR clause automatically reinstated on January 1, 2004, when the rate freezes imposed by MCL 460.10d(1) expired, and granted, in part, Edison's request for interim rate relief. However, the PSC declined to act on Edison's PSCR plan at that time on the ground that the PSCR clause had been automatically reinstated.

In the proposal for decision (PFD), the hearing referee noted that Edison had stated that it anticipated filing a separate 2005 PSCR plan case by

September 30, 2004,[28] and, on that basis, concluded that Edison had withdrawn its request for approval of a PSCR plan as part of the general rate case. Edison denied that it had withdrawn its PSCR plan, and contended that the PSCR plan should continue to be addressed with the general rate case. Edison asserted that its filing of a PSCR plan pursuant to MCL 460.6j(18) was proper, but that the PSC had, implicitly at least, rejected that application and instead established a 2004 PSCR plan pursuant to MCL 460.6j(3)-(7).[29]

In its November 23, 2004, order, the PSC stated that it had not rejected Edison's application to establish a PSCR plan under MCL 460.6j(18). However, the PSC stated that given the hearing referee's failure to address the PSCR issues in the PFD, the PSC was left with the problem of how to fashion an appropriate remedy. Furthermore, the PSC decided that all PSCR issues not addressed could be addressed in Edison's 2004 PSCR reconciliation case, to be filed no later than March 31, 2005. Finally, the PSC directed the hearing referee in Case No. U-14275 to address whether Edison's application for a 2005 PSCR plan was permitted in light of the requirement

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[28] Edison filed an application for a 2005 PSCR plan. The application was docketed as Case No. U-14275.

[29] A PSCR plan filed pursuant to MCL 460.6j(3)-(7) features an annual PSCR plan setting PSCR factors for a 12-month period, a five-year forecast, and an annual reconciliation case.

of MCL 460.6j(18) that PSCR factors cover a period of 48 months.[30]

Edison sought rehearing of the PSC's November 23, 2004, order, and argued that its PSCR proposal was consistent with MCL 460.6j(18) and that the PSC's order was inconsistent with that statute. In its order granting in part and denying in part Edison's petition, the PSC stated:

> The Commission concludes that it should treat Detroit Edison's request for PSCR reinstatement and establishment of PSCR base and factors to have been properly raised under Section 6j(3)-(7), rather than Section 6j(18). The Commission notes that the applicant did not present testimony to support factors that would be in effect for 48 months. Nor did any of the parties treat the PSCR base and factor issues as if they would be in effect for that period of time. Detroit Edison made it clear that it intended to file a 2005 PSCR plan case and a 2004 PSCR reconciliation case outside of this docket. Everything except the citation in its application suggests that Detroit Edison sought relief pursuant to Section 6j(3)-(7), not Section 6j(18). The Commission further notes that the published notice for this case did not specify

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[30] The AG moved to dismiss Edison's 2005 PSCR plan case on the ground that it violated MCL 460.6j(18). In an order entered on June 30, 2005, in Case No. U-14275, the PSC denied the AG's motion to dismiss. The AG's appeal from the PSC's decision is currently pending before this Court (Docket No. 265869).

> under which subsection of Section 6j the Commission would consider Detroit Edison's request for PSCR factors. Moreover, any defect in notice has not prejudiced the parties because the issues are essentially the same, whichever subsection is used, and the parties have had ample opportunity to raise and argue issues related to the reasonableness and prudence of the projected costs and power supply. Therefore, the Commission concludes that it should grant rehearing on this issue and amend the November 23 order to reflect that the PSCR portion of that order was completed pursuant to MCL 460.6j(3)-(7).

The AG argues that the PSC's order of June 30, 2005, granting in part and denying in part Edison's petition for rehearing is unlawful because it violates MCL 460.6j(18) by allowing Edison to file annual PSCR plan cases. Edison's application for a general rate case and implementation of its PSCR clause was filed pursuant to MCL 460.6j(18). Under that statute, Edison must file annual reconciliation cases and refund over-recoveries to ratepayers, but is precluded from filing any additional PSCR plan cases or surcharging ratepayers for under-recoveries for the 48-month period. The AG contends that the PSC's erroneous conclusion that Edison sought implementation of a PSCR clause under MCL 460.6j(3)-(7) allows Edison to file new PSCR plan cases annually and raise rates. We disagree.

The PSC's decision does not violate MCL 460.6j(18). Contrary to the AG's contention on appeal, this issue involves more than the PSC's rote application of MCL

460.6j(18). On June 20, 2003, Edison filed an application for a general rate case and, in conjunction therewith, sought reinstatement of its PSCR clause. In connection with its request for reinstatement of the PSCR clause, Edison also requested that its PSCR clause remain suspended until the PSC authorized rate relief. Edison cited MCL 460.6j(18).

However, the PSC concluded that Edison's PSCR clause automatically reinstated on January 1, 2004, when the rate freezes imposed by MCL 460.10d(1) expired. Ultimately, and after confusion engendered by unclear language in both the PFD and the PSC's November 23, 2004, order, the PSC concluded in its June 30, 2005, order granting in part and denying in part Edison's petition for rehearing that it should treat Edison's request for reinstatement and establishment of a PSCR base and factors pursuant to MCL 460.6j(3) through (7), rather than MCL 460.6j(18). This conclusion is consistent with the PSC's finding that Edison's PSCR clause was automatically reinstated.

Edison's actions in the proceedings before the PSC are consistent with the PSC's conclusion that, Edison's citation of MCL 460.6j(18) in its application notwithstanding, Edison intended to and did seek establishment of a PSCR base and factors pursuant to MCL 460.6j(3) through (7). Edison filed a separate 2005 PSCR plan case. Such a case could only proceed pursuant to MCL 460.6j(3) through (7) because it was not filed in conjunction with a general rate case.[31]

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[31] The PSC's denial of the AG's motion to dismiss the 2005 PSCR plan case is consistent with the PSC's determination in this

Given the PSC's conclusion that Edison's PSCR clause was automatically reinstated, and Edison's act of filing a separate 2005 PSCR plan case, we conclude that Edison's citation of MCL 460.6j(18) was not controlling, and that the PSC correctly concluded that it should treat Edison's request for establishment of a PSCR base and factors as having been brought under MCL 460.6j(3) through (7). The PSC's construction of the applicable regulatory scheme is reasonable and is entitled to deference. *Champion's Auto Ferry, supra.* The PSC's decision is not unlawful, nor is it unreasonable. MCL 462.26(8).

V. CONCLUSION

We reverse that portion of the PSC's November 23, 2004, order that authorized Edison to impose a surcharge of $0.05 a meter each month on all customers to subsidize its renewable energy program, and reverse the PSC's ruling that Edison may not recover its allocated share of the control premium, but affirm the PSC's orders in all other respects.

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matter that Edison intended to proceed pursuant to MCL 460.6j(3) through (7).

APPENDIX P

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

Case No. U-13808

[Filed June 30, 2005]

In the matter of the application of	)
THE DETROIT EDISON COMPANY	)
to increase rates, amend its rate schedules	)
governing the distribution and supply of	)
electric energy, implement power supply cost	)
recovery plans, factors, and reconciliations in	)
its rate schedules for jurisdictional sales of	)
electricity, and for miscellaneous accounting	)
authority and regulatory asset recovery.	)
	)

At the June 30, 2005 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chairman
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

ORDER DENYING REHEARING

On November 23, 2004, the Commission issued the final order in this rate proceeding. On December 22,

2004, the Michigan Environmental Council and the Public Interest Research Group in Michigan (MEC/PIRGIM) filed a petition for rehearing and reconsideration of the Commission's treatment of issues surrounding the spent nuclear fuel (SNF) surcharge. On January 10, 2005, Attorney General Michael A. Cox filed an answer to the petition in which he states that he does not take a position on the arguments raised by MEC/PIRGIM, but desires to reserve the right to subsequently challenge the lawfulness or reasonableness of any relief granted by the Commission pursuant to the petition. On January 12, 2005, The Detroit Edison Company (Detroit Edison) filed an answer opposing MEC/PIRGIM's petition for rehearing.

In the November 23 order, the Commission briefly addressed the SNF surcharge as follows:

> MEC/PIRGIM maintains that the ALJ erroneously endorsed the position taken by Detroit Edison regarding the issue of [SNF] fees by finding that the matter should not be considered in this proceeding.
>
> The Commission finds that the ALJ cannot be faulted for his recommendation. On several prior occasions, the Commission has addressed related issues. See, the November 20, 2001 order in Case No. U-12613. Moreover, the issues raised by MEC/PIRGIM are currently under consideration in a complaint proceeding docketed as Case No. U-13771.

Order, p. 120.

MEC/PIRGIM state their understanding that this case presented many complex issues, besides the SNF surcharge, that required prompt and focused attention. However, they argue, now that the major work of producing the final order in the rate case is complete, the Commission should take this opportunity to consider the evidence and arguments presented on SNF issues. They argue that the present case, which combined a general rate proceeding with power supply cost recovery (PSCR) issues, encompasses almost all of the regulatory authority the Commission possesses with respect to an electric utility's recovery of costs. Therefore, they argue, the Commission may require further regulatory investigations, make findings relative to base rates and PSCR factors, and even inquire into nuclear decommissioning issues, as they relate to SNF costs and rate effects.

MEC/PRIGIM argue that the Commission violated its duties to determine rate issues in accordance with its enabling statutes, the Michigan Administrative Procedures Act (APA), MCL 24.201 *et seq.*, and due process. They argue that the Commission actually issued a non-decision concerning SNF costs, despite the presence of "extensive expert testimony and exhibits concerning SNF and cost issues" and full briefing of those issues. Petition, p. 2.

MEC/PRIGIM argue that the Commission's decision fails to comply with the notice and hearing requirements established in its enabling statutes. They argue that MCL 460.6a required prior notice and hearing in cases involving utility rate increase applications. They state that those requirements are applicable to SNF costs, as Detroit Edison included its

SNF fees and other costs for recovery in this case. They argue that if Detroit Edison may include these costs for recovery, then intervenors must be permitted to seek meaningful review and consideration of those costs.

MEC/PRIGIM argue that the Commission has the jurisdiction, authority, and duty under its enabling acts to require Detroit Edison to file a full and complete case regarding its SNF costs, and to thereafter undertake a full review of those costs, and to impose appropriate remedies. They argue that due process rights include the right to an agency decision that makes findings and states conclusions based upon the record as a whole.

MEC/PIRGIM further argue that the Commission should consider additional protective remedies in addition to investigation and review and potential rate disallowance, including a separate SNF decommissioning trust fund, establishment of bond requirements, and inquiry into insurance or additional protection for decommissioning funds. They assert that the Commission should adopt its proposed "enhanced review" of SNF related costs and their recovery, as described by their witness, Ronald Callen.

Further, MEC/PIRGIM argue that the Commission should reject rate recognition of SNF fees because Detroit Edison failed to provide a basis upon which those costs may be deemed reasonable and prudent. They argue that these costs should not be included in rates based on a presumption of reasonableness. Moreover, MEC/PIRGIM assert, Detroit Edison has failed to be reasonable and prudent in continuing to

pay the fees without creating a contingency plan for the probable failure of the federal government to supply a storage facility within any reasonable time. They assert that Detroit Edison failed to demonstrate the reasonableness and prudence of its enforcement actions with regard to the standard contract for SNF disposal.

Moreover, MEC/PIRGIM argue, although Detroit Edison may continue to pay the SNF fee as a matter of management prerogative, the Commission has an independent duty to protect ratepayers by making appropriate rate adjustments. They argue that the Commission need not incorporate the SNF fees in Detroit Edison's rates. MEC/PIRGIM insist that the Commission is not preempted by federal law from disallowing recovery of these fees.

MEC/PIRGIM further argue that the citation to Case No. U-13771 as a forum for issues related to SNF is not comforting, because that proceeding has motions pending before the administrative law judge and the Commission, and no hearings have been scheduled. Moreover, MEC/PIRGIM argue, they seek a different remedy here, the disallowance of SNF fees from rates. They argue that the Commission, on rehearing, has an opportunity to fully consider Detroit Edison's SNF costs and rate issues, including nuclear decommissioning issues.

Detroit Edison responds that MEC/PIRGIM merely restate their arguments from this and prior cases, expressing disagreement with the Commission's consistent rejection of those arguments. Thus, Detroit

Edison argues, the petition for rehearing does not meet the Commission's standards for granting rehearing.

Detroit Edison goes on to argue that no law requires what MEC/PIRGIM demand, and asserts that Detroit Edison's presentation concerning base rates met any reasonable standard of completeness and demonstrated prudent company strategies and actions. The utility argues that MEC/PIRGIM merely rehash their failed appellate attacks on the Commission's rejection of their arguments, citing *MEC* v *Public Service Comm*, unpublished opinion *per curiam* of the Michigan Court of Appeals, decided May 11, 2004 (Docket Nos. 244354 and 246744), that affirmed the Commission's order in Case No. U-12725. Detroit Edison provides a history of the cases in which the SNF issues have arisen and been rejected. *See*, Detroit Edison response to MEC/PIRGIM, p. 4-8.

Moreover, Detroit Edison argues, the SNF arguments raised by MEC/PIRGIM have fatal defects, which the Commission has repeatedly recognized when rejecting them. Detroit Edison states that because federal law requires it to pay these SNF charges and fees, the Commission is preempted from preventing Detroit Edison from recovering these costs in its rates. Detroit Edison argues that the Commission should reject the argument that the utility should be held accountable if the United States Department of Energy fails to meet its statutory duty to obtain and construct a SNF storage facility. In Detroit Edison's view, there is no element of discretion involved as to whether it must make these payments. It argues that adopting the remedies suggested by MEC/PIRGIM will not bring about a speedier resolution to the SNF storage

issues. Rather, it would simply penalize Detroit Edison for the failure of a governmental agency over which Detroit Edison has no control, a penalty without legal or factual basis.

Detroit Edison affirmatively states that it has been reasonable and prudent with respect to its SNF costs, and the relief requested by MEC/PIRGIM would result in an unconstitutional taking. US Const, Am V; Const 1963, art 10, § 2.

Detroit Edison goes on to argue that MEC/PIRGIM has failed to allege or demonstrate any credible basis for finding that SNF costs are unreasonable or imprudent. It asserts that its costs are presumed to be reasonable and prudent, and beyond that, the utility has taken reasonable and prudent actions with regard to its SNF costs. To withhold the payments required by federal law, Detroit Edison states, would risk the loss of Fermi 2's license. Detroit Edison points out that, in previous cases, Detroit Edison has demonstrated its substantial actions regarding SNF costs.

Finally, Detroit Edison argues, MEC/PIRGIM seek relief that is outside the Commission's authority and jurisdiction.

Rule 403 of the Commission's Rules of Practice and Procedure, 1999 AC, R 460.17403, provides that a petition for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. A petition for rehearing is not merely another opportunity for a party to argue a position or to express disagreement

with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing.

The Commission finds that the petition for rehearing should be denied, as the petition does not meet the standards for granting rehearing. MEC/PIRGIM merely raises again the same arguments that the Commission should involve itself in judging the reasonableness of costs assessed by federal statute. The Commission finds that Detroit Edison has provided sufficient basis upon which to find that it has reasonably and prudently incurred its SNF costs, and MEC/PIRGIM has not successfully demonstrated otherwise.

As the Commission intended to convey in its November 23, 2004 order, it agrees with the discussion and conclusions of the Proposal for Decision at pages 110-113. The Commission is not persuaded that it should reach a different conclusion at this time.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 *et seq.*; 1919 PA 419, as amended, MCL 460.51 *et seq.*; 1939 PA 3, as amended, MCL 460.1 *et seq.*; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*

b. The petition for rehearing filed by MEC/PIRGIM of the November 23, 2004 order should be denied.

THERFORE, IT IS ORDERED that the December 22, 2004 petition for rehearing filed by the Michigan Environmental Council and the Public Interest Research Group in Michigan is denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

(SEAL)

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of June 30, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

b. The petition for rehearing filed by MEC/PIRGIM of the November 23, 2004 order should be denied.

THERFORE, IT IS ORDERED that the December 22, 2004 petition for rehearing filed by the Michigan Environmental Council and the Public Interest Research Group in Michigan is denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

(SEAL)

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of June 30, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

APPENDIX Q

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

Case No. U-13808

[Filed November 23, 2004]

In the matter of the application of	)
THE DETROIT EDISON COMPANY	)
to increase rates, amend its rate schedules	)
governing the distribution and supply of	)
electric energy, implement power supply cost	)
recovery plans, factors, and reconciliations in	)
its rate schedules for jurisdictional sales of	)
electricity, and for miscellaneous accounting	)
authority and regulatory asset recovery.	)
	)

At the November 23, 2004 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chair
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

OPINION AND ORDER

[pp. 1-4]

I. Preface

This order is the culmination of the efforts of eighteen parties and countless individuals. It represents the end product of an investigation into the operations of the largest electric utility in this state whose rates have not been subject to similar scrutiny in over a decade.

Earlier, the Commission recognized that this proceeding was "among the most complex cases ever considered." November 4, 2003 order, Case No. U-13808, p. 8. It affects not only the operations of the utility, but also the finances of over two million of its residential and business customers in ways that no proceeding brought before this agency has ever done. In addition to resetting the utility's rates on both an interim and a final basis, the application requested approval of a regulatory asset recovery surcharge, reinstatement of the company's power supply cost recovery (PSCR) mechanism, a determination of the utility's stranded costs, and implementation of a novel "mitigation adjustment" designed to allow the utility "to retain the economic benefit associated with the mitigation of generation contribution margin loss when customers leave bundled tariff service." Application, ¶14, p. 5. The application also sought approval of an earnings-sharing mechanism, termination of securitization and transition charges for electric choice customers, and authorization for use of excess securitization savings to recover previously deferred and unrecovered net stranded costs.

Despite having so much at stake, the parties engaged in their various adversarial roles in a professional manner. For that, the Commission is thankful. Moreover, all participants, including the Commission's employees, should be commended for completing this enormous undertaking in so timely a manner.

II. History of Proceedings

On June 20, 2003, The Detroit Edison Company (Detroit Edison) filed an application for an increase in its rate schedules governing distribution and supply of electric energy, determination of its stranded costs, implementation of its PSCR clause, and other various accounting and regulatory matters.[1]

On July 28, 2003, Administrative Law Judge Daniel E. Nickerson, Jr. (ALJ) conducted a prehearing conference, which was attended by Detroit Edison, the National Energy Marketers Association (NEMA), Constellation NewEnergy (CNE), Energy Michigan, the Association of Businesses Advocating Tariff Equity (ABATE), The Kroger Co. (Kroger), Energy Conversions LLC., Mackinaw Power LLC (Mackinaw), North American Wind Energy LLC (NAWE), the Michigan Environmental Council and the Public Interest Research Group in Michigan (MEC/PIRGIM), the Residential Ratepayers Consortium (RRC), Utility Workers Local 223, Pietro Zebri, Douglas Moore,

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[1] Prior to filing this proceeding, Detroit Edison's rates were last comprehensively reviewed and determined by the Commission in its January 21, 1994 order in Case No. U-10102.

Nordic Marketing LLC (Nordic), Attorney General Michael A. Cox (Attorney General), and the Commission Staff (Staff). The ALJ granted petitions to intervene filed by NEMA, CNE, Energy Michigan, ABATE, Kroger, Energy Conversions, Mackinaw, NAWE, MEC/PIRGIM, the RRC, Utility Workers Local 223, Mr. Zebri, Mr. Moore, Nordic, and the Attorney General.[2] Then, the ALJ granted a motion by ABATE, Energy Michigan, and Kroger to suspend the proceeding pending Detroit Edison's decision to make a possible securitization filing. Detroit Edison applied for leave to appeal the ALJ's ruling to the Commission.

A second prehearing was held on August 8, 2003. At that time, Detroit Edison informed the ALJ that it had decided not to file a securitization case until after the filing of reply briefs and that the company would be withdrawing its application for leave to appeal. Accordingly, the ALJ set a schedule for the interim rate relief hearing.

On August 18, 2003, the Commission ordered the parties to brief the issue concerning Detroit Edison's reinstatement of its PSCR clause.[3]

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[2] On March 5, 2004, United Utilities, L.L.C., filed a petition for late intervention, which was denied by the ALJ at 11 Tr. 1833. United Utilities did not appeal this ruling, but it did submit comments by letter on April 26, 2004.

[3] On December 18, 2003, an order was issued by the Commission reinstating Detroit Edison's PSCR clause. Detroit Edison filed an appeal of the Commission order with the Court of Appeals.

On August 19, 2003, Detroit Edison filed an application for leave to appeal the schedule set by the ALJ. On November 4, 2003, the Commission issued an order changing the deadlines for filing briefs and reply briefs in the interim relief schedule. Hearings were conducted on the interim relief portion of the case on January 5-13, 2004.

On February 4, 2004, briefs regarding interim relief were filed by Detroit Edison, the Staff, MEC/PIRGIM, ABATE, the Attorney General, Kroger, the RRC, and Energy Michigan. Reply briefs were filed by Detroit Edison, the Staff, CNE, ABATE, the Attorney General, Kroger, the RRC, and Energy Michigan on February 10, 2004.

On February 20, 2004, the Commission issued its order granting, in part, Detroit Edison's request for interim relief, which authorized Detroit Edison to increase its rates by $248,430,000 on an annual basis and to place into effect certain interim surcharges. Several parties sought rehearing of the February 20 order.

The ALJ conducted hearings on the final relief portion of the case on April 12-21, 2004. The record consists of 15 volumes of transcript totaling 3,239 pages. In addition, 235 exhibits were admitted into evidence. Briefs and reply briefs were filed on May 14, 2004 and May 28, 2004 by Detroit Edison, the Staff, the Attorney General, ABATE, MEC/PIRGIM, Energy Michigan, Kroger, the RRC, Mackinaw, CNE, and NAWE.

On August 26, 2004, the ALJ issued his Proposal for Decision (PFD). Exceptions and replies to exceptions were timely filed by Detroit Edison, the Staff, the Attorney General, ABATE, MEC/PIRGIM, Energy Michigan, Kroger, the RRC, and CNE on September 16 and October 7, 2004, respectively.[4]

* * *

[p. 17]

The ALJ also recommended that the Commission reject MEC/PIRGIM's position regarding spent nuclear fuel (SNF) in its entirety, noting that the Commission had rejected similar arguments in previous cases. Further, the ALJ expressed his belief that no policy changes were warranted to justify the relief sought by MEC/PIRGIM. Therefore, the ALJ recommended that Detroit Edison be authorized to continue the collection of SNF fees and costs in accordance with the federal Nuclear Waste Policy Act of 1982, 42 USC 10101 et seq. (NWPA).

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[4] Together, the documents contained in the docket of this case encompass nearly 13,000 pages of testimony, exhibits, comments, and legal pleadings. All of this information may be viewed at http://efile.mpsc.cis.state.mi.us/cgi-bin/efile/viewcase.pl?casenum=13808.

[p. 120]

* * *

XV. Spent Nuclear Fuel Surcharge

MEC/PIRGIM maintains that the ALJ erroneously endorsed the position taken by Detroit Edison regarding the issue of spent nuclear fuel (SNF) fees by finding that the matter should not be considered in this proceeding.

The Commission finds that the ALJ cannot be faulted for his recommendation. On several prior occasions, the Commission has addressed related issues. See, the November 20, 2001 order in Case No. U-12613. Moreover, the issues raised by MEC/PIRGIM are currently under consideration in a complaint proceeding docketed as Case No. U-13771.

* * *

[pp. 127-130]

* * *

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 300, as amended, MCL 462.2 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq.

b. Detroit Edison is experiencing a revenue deficiency in the annual amount of $335,812,000 and, according to the terms of this order, an increase in its annual revenues is warranted.

c. Detroit Edison should be directed to file an application to resolve other remaining stranded cost issues addressed in this order in conjunction with its PSCR reconciliation cases.

d. Detroit Edison should be directed to meet with interested parties to discuss the implementation of a program containing the essential elements of the PAYS® concept and the unresolved electric choice metering issues. Detroit Edison should include any tariff proposal for which there is substantial agreement in its next general rate case application. The company should also be directed to file a report with the Commission no later than March 15, 2005.

e. The petitions for rehearing of the February 20, 2004 interim order should be dismissed.

f. The bond requirement established by the February 20, 2004 interim order should be rescinded.

g. Detroit Edison should be directed to file an application to unbundled its rates and to resolve certain other rate subsidiaries and imbalances between distribution rates of bundled and unbundled customers on or before March 23, 2005.

h. Detroit Edison should be ordered to implement an REP as set forth in the order.

THEREFORE, IT IS ORDERED that:

A. The Detroit Edison Company is authorized to increase its annual electric revenues by $335,812,000 consistent with rate cap provisions of 2000 PA 141 for service rendered on and after November 24, 2004 and as provided in this order, which is $87,382,000 above interim relief.

B. Within 30 days, The Detroit Edison Company shall file revised rate schedules reflecting the rates approved in this order and set forth on Exhibit A.

C. The Detroit Edison Company shall file a proceeding to address other remaining stranded cost issues addressed in this order.

D. The Detroit Edison Company shall immediately convene collaborative meetings with interested parties and the Commission Staff to discuss the implementation of a program containing the essential elements of the PAYS® concept and the unresolved electric choice metering issues. The company shall file reports of the agreed resolutions on these issues with the Commission as soon as any resolutions are reached, but no later than March 15, 2005.

E. The petitions for rehearing of the February 20, 2004 interim order are rejected.

F. The bond requirement established by the February 20, 2004 interim order is rescinded.

G. The Detroit Edison Company shall file an application to unbundled its rates and to resolve

certain other rate subsidies and imbalances between distribution of bundled and unbundled customers on or before March 23, 2005.

H. The Detroit Edison Company shall continue the Low Income and Energy Efficiency Fund program authorized in the February 20, 2004 order in this proceeding.

I. Due to their length, the revised tariff sheets approved this order are included in the Commission's docket file for this proceeding, but they have not been attached to copies of this order. However, an electronic version of the revised tariff sheets does appear on the Commission's website.

J. The Detroit Edison Company is directed to implement a renewable energy program as set forth in the order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of November 23, 2004.

/s/ Mary Jo Kunkle
Its Executive Secretary

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of November 23, 2004.

/s/ Mary Jo Kunkle
Its Executive Secretary

APPENDIX R

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

Case No. U-13808

[Filed August 26, 2004]

In the matter of the application of	)
THE DETROIT EDISON COMPANY	)
to increase rates, amend its rate schedules	)
governing the distribution and supply of	)
electric energy, implement power supply cost	)
recovery plans, factors, and reconciliations in	)
its rate schedules for jurisdictional sales of	)
electricity, and for miscellaneous accounting	)
authority and regulatory asset recovery.	)
	)

PROPOSAL FOR DECISION

I.

HISTORY OF PROCEEDINGS

[p.1]

On June 20, 2003 The Detroit Edison Company (Detroit Edison or the Company) filed its application for an increase in its rate schedule governing

distribution and supply of electric energy, implementation of its power supply cost recovery (PSCR) clause and other various accounting and regulatory matters. Along with its application, Detroit Edison filed direct testimony and exhibits. On July 3, 2003 the Michiga Public Service Commission (Commission) issued a notice of prehearing conference.

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[pp. 109-113]

* * *

Spent Nuclear Fuel (SNF)

Detroit Edison takes the position that the Commission should reject MEC/PIRGIM's position regarding spent nuclear fuel (SNF) in its entirety. Detroit Edison argues that the Commission has consistently rejected MEC/PIRGIM's exact position in numerous past Commission orders. Detroit Edison continues that federal preemption requires the Commission to allow Detroit Edison the ability to recover all SNF fees and costs. In addition, Detroit Edison argues that all SNF costs and fees have been reasonably and prudently incurred. Detroit Edison adds MEC/PIRGIM has failed to allege or demonstrate any credible basis for finding that SNF costs and fees were unreasonable or imprudent. Further, Detroit Edison argues that the revocation of Detroit Edison's ability to collect SNF costs and fees would result in an unconstitutional "taking". Finally, Detroit Edison argues that MEC/PIRGIM seeks relief that is outside the Commission's statutory authority and jurisdiction.

MEC/PIRGIM argues that the Commission should undertake a thorough review of all Detroit Edison's SNF fees and costs. MEC/PIRGIM argues that Detroit Edison has not filed a plan or any adequate evidence to establish that the SNF fees and costs are reasonable and prudent. In addition, MEC/PIRGIM argues that Detroit Edison has not established that the minimal amount of SNF costs and fees, in accordance with *Wisconsin Electric*[34], are being paid. Further, MEC/PIRGIM states that the SNF fees and costs being collected by Detroit Edison are being paid for a permanent depository in which does not exist. MEC/PIRGIM takes the position that the federally mandated collection of SNF fees and costs could result in billions of dollars in losses to ratepayers, if the federal government fails to build a permanent depository for SNF. Finally, MEC/PIRGIM argues that the Commission has authority under Act 304 to adopt appropriate remedies to protect ratepayers and the public's interest from this potential default.

The ALJ finds that Detroit Edison presents the appropriate position concerning SNF fees and costs. Additionally, the ALJ is persuaded that the MEC/PIRGIM position is unsupported based on prior Commission precedent. Finally, the ALJ believes that preemption prevents state intervention into the federally regulated nuclear arena.

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[34] *Wisconsin Electric Company v. DOE*, 250 U.S. App. D.C. 128.

In 1982, Congress instituted the Nuclear Waste Policy Act[35] (NWPA) to create the framework for the operation and management of a permanent site for the disposal of SNF; as well as creating a funding mechanism for the administration of the depository. Congress enacted legislation to establish a disposal method to accommodate the ever-ncreasing amount of SNF produced by private sector nuclear power generation. The NWPA is "a comprehensive statute that provides for the establishment of a geologic depository for disposal of high-level radioactive waste by the Department of Energy"[36] (DOE). Under the NWPA, all civilian nuclear power generating utilities are required to contract with the DOE and provide prepayment for waste disposal services they will ultimately require. Congress has established the rate to be paid by these utilities into the NWF at 1.0 mil per kilowatt-hour.[37] This rate would be paid to the NWF in exchange for the transfer of title, transportation, and disposal of all SNF.[38] This prepayment is deposited into the Nuclear Waste Fund[39] (NWF) and held by the Secretary of the Treasury[40]. The NWF may be used only for "purposes

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[35] 42 USC §§ 10101 et seq.

[36] *Texas v. United States DOE*, 754 F2d 550 (CA 5 1985).

[37] 42 USC §§ 10222(a)(2).

[38] 42 USC §§ 10222(a)(1).

[39] 42 USC §§ 10222(c).

[40] 42 USC §§ 10222(e).

of radioactive waste disposal activities"[41], which include "the administrative cost of the radioactive waste disposal program"[42] and "the costs associated with acquisition, design, modification, replacement, operation, and construction of facilities at a repository site."[43]

The ALJ finds that the Commission has established the correct position regarding the reasonableness and prudently incurred SNF costs in *U-12613*[44]. In this case, MEC/PIRGIM had intervened to argue for the Commission to require Wisconsin Public Service Corporation (WPS) to escrow the NWF payments, post a performance bond, or purchase liability insurance. These measures were recommended by MEC/PIRGIM to provide an alternative funding source in case of a complete DOE default in accepting SNF. MEC/PIRGIM cited Act 304 as the authority for the Commission to enact the proposed remedies.

The ALJ, in *U-12613*[45], found that Act 304 did not authorize the proposed remedies sought by MEC/PIRGIM. The Commission adopted the ALJ's findings and stated,

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[41] 42 USC §§ 10222(d).

[42] 42 USC §§ 10222(d)(3).

[43] 42 USC §§ 10222(d)(5).

[44] *MPSC Case No. U-12613*, dated November 20, 2001.

[45] id.

> Undoubtedly, the waste disposal issues confronting WPS Corp and the nuclear industry as a whole are significant, and a solution will not be implemented in accordance with the DOE's contractual timetable. However, the Commission finds that the MEC/PIRGIM's proposals are not necessary to correct any showing of an unreasonable or imprudent action or omission on the part of the WPS Corp's management that adversely affects the rates paid by PSCR customers. The problem is larger than WPS Corp's nuclear operation, feasible alternatives to the DOE's construction of a permanent repository are not readily apparent, and the Commission is unable to find that WPS Corp has been imprudent. Moreover, the MEC/PIRGIM's remedial proposals are beyond the scope of a PSCR proceeding.[46]

The ALJ is of the opinion that the Commission's order in *U-12613*[47] is equally applicable to the instant rate case. The ALJ finds no superceding issues or legal developments that would warrant an alternative conclusion from the Commission's ruling in *U-12613*[4849]. The ALJ is persuaded that the Commission has elected to defer to the requirements

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[46] id. at 8-9.

[47] id.

[48] id.

[49] *U-12613* was a Wisconsin Electric application for a PSCR plan.

established under the NWPA[50] and wait patiently until the permanent SNF depository at Yucca Mountain, Nevada is completed.[51]

The ALJ recommends that the Commission reject MEC/PIRGIM's position regarding SNF in its entirety. The ALJ is convinced the Commission has properly and adequately addressed the SNF issue in numerous prior cases[52]. Further, the ALJ is of the opinion that there have been no developments that would warrant a policy change to justify the relief sought by MEC/PIRGIM. Finally, the ALJ recommends that Detroit Edison continue the collection of SNF fees and costs in accordance with the NWPA[53].

* * *

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[50] supra

[51] According to the DOE, the projected date of completion of Yucca Mountain is 2010.

[52] See: *MPSC Case. Nos. U-11314, U-11495, U-12121, U-12613, U-12615,* and *U-12725.*

[53] 42 USC § 10101, et seq.

APPENDIX S

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED

[Filed April 1, 2008]

No. 261718
Public Service Commission
LC No. 00-013917

ADRIAN ENERGY ASSOCIATION, L.L.C., CADILLAC RENEWABLE ENERGY, L.L.C., GENESEE POWER STATION, L.P., GRAYLING GENERATING STATION, L.P., HILLMAN POWER COMPANY, L.L.C., TES FILER CITY STATION, L.P. VIKING ENERGY OF LINCOLN, INC., and VIKING ENERGY OF MCBAIN, INC.,
Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION, CONSUMERS ENERGY COMPANY, MIDLAND COGENERATION VENTURE, L.P., and ATTORNEY GENERAL OF THE STATE OF MICHIGAN,
Appellees.

No. 261747
Public Service Commission
LC No. 00-013917

ATTORNEY GENERAL OF THE STATE OF MICHIGAN,
Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, CONSUMERS ENERGY COMPANY, ADRIAN ENERGY ASSOCIATION, L.L.C., CADILLAC RENEWABLE ENERGY, L.L.C., GENESEE POWER STATION, L.P., GRAYLING GENERATING STATION, L.P., HILLMAN POWER COMPANY, L.L.C., TES FILER CITY STATION, L.P., VIKING ENERGY OF LINCOLN, INC., VIKING ENERGY OF MCBAIN, INC., and MIDLAND COGENERATION VENTURE, L.P.,
Appellees.

No. 264860
Public Service Commission
LC No. 00-013917

MICHIGAN ENVIRONMENTAL COUNCIL and PUBLIC INTEREST RESEARCH GROUP,
Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION

and CONSUMERS ENERGY COMPANY,)
Appellees.)
)

Before: Davis, P.J., and Murphy and Servitto, JJ.

PER CURIAM.

These three consolidated appeals arise from the Public Service Commission's February 28, 2005, order in response to Consumers Energy Company's application for approval of a power supply cost recovery (PSCR) plan, and for authorization of monthly PSCR factors for 2004. We affirm.

I. Underlying Facts

The federal Public Utility Regulatory Policies Act (PURPA)[1] encourages the development of alternative power sources in the form of cogeneration and small power production facilities, and authorizes the promulgation of rules to require electric utilities to offer to purchase electricity from qualifying cogeneration facilities (QFs). 16 USC 824a-3(a)(2).

18 CFR 292.304(a)(1) states that rates for such purchases must be reasonable and nondiscriminatory. Subsection (a)(2) specifies that no utility will have to pay more than its avoided costs. See also 16 USC 824a-3(b)(2). "Avoided costs" are "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying

[1] PL 95-617; 92 Stat 3117.

facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 CFR 292.101(b)(6). See also 16 USC 824a-3(d).

A PSCR factor is "that element of the rates to be charged for electric service to reflect power supply costs incurred by an electric utility and made pursuant to a power supply cost recovery clause incorporated in the rates or rate schedule of an electric utility." MCL 460.6j(1)(b). A PSCR clause is

> a clause in the electric rates or rate schedule of a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices. [MCL 460.6j(1)(a).]

In Docket No. 261718, appellants, QFs who produce electricity from renewable sources which they sell to Consumers Energy through power purchase agreements (PPAs), appeal as of right from the PSC's decision to allow Consumers to calculate avoided costs on the basis of the sub-bituminous coal of which it has made increasing use in recent years, instead of the moreexpensive bituminous coal that the parties envisioned when they first executed their agreements.

In Docket No. 261747, the Attorney General appeals as of right from the PSC's order insofar as it

approved a higher PSCR factor despite a rate cap, and allowed appellee Consumers to recover through a PSCR clause the costs of purchasing transmission services.

In Docket No. 264860, appellants Michigan Environment Council (MEC) and Public Interest Research Group in Michigan (PIRGIM) echo the Attorney General's objections to allowing Consumers to raise its PSCR clause despite statutory rate caps, and additionally take issue with the PSC's having allowed Consumers to recover, through its PSCR clause, its costs relating to disposal of spent nuclear fuel.

II. Standards of Review

A final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Attorney General v Public Service Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987). All rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. MCL 462.25. See also *Michigan Consolidated Gas Co v Public Service Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment.

In re MCI Telecommunications Complaint, supra, 460 Mich 396, 427; 596 NW2d 164 (1999).

A reviewing court should defer to the PSC's administrative expertise, and not substitute its judgment for that of the PSC. *Attorney General v Public Service Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). Discovery decisions are reviewed for an abuse of discretion. See *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 478; 608 NW2d 823 (2000).

Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Michigan*, 254 Mich App 675, 682; 658 NW2d 849 (2003). Contract interpretation likewise presents a question of law, calling for review de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

III. Docket No. 261718

A. Avoided Costs

The QFs first assert that the PSC concluded that they had negotiated something other than avoided costs, and argue that the evidence did not support this conclusion. However, review of the record reveals that the PSC did not, in fact, state that the parties bargained for something other than avoided costs, but instead that the PSC recognized that the method for determining avoided energy costs in this instance depended on contract language.

The PPAs for most of the QFs state that the "energy payment rates to be paid by Consumers are based on the concept of 'avoided costs' as now described in Section 10 of [PURPA]" and applicable rules. All the PPAs include a detailed formula for determining energy charges, including that the various factors would be based on "[e]ach coal-fired plant or portion of a coal-fired plant (. . . Base Plant . . .) . . . which are owned wholly or partially, directly or indirectly by Consumers," being connected to the electrical grid and having specified capacity. The energy charge rates include one constituting "[t]he average cost per kilowatthour . . . for fuel inventory at the Base Plants during the Most Recent Calendar Year," for which "fuel inventory cost" is to be calculated on the basis of "Consumers' total fuel related expenses at the Base Plants as set forth in its Power Supply Cost Recovery (PSCR) Monthly Reports or successor documents . . . for the Most Recent Calendar Year."

The various parts of a contract should be read together. See, e.g., *JAM Corp v AARO Disposal, Inc*, 461 Mich 161, 170; 600 NW2d 617 (1999). Accordingly, we understand the specific methodology for establishing energy charges to represent the parties' plan for determining avoided costs.

In the proposal for decision, the administrative law judge (ALJ) observed that "parties are free to enter into a contract that provides for payment based on something other than avoided costs," then went on to conclude that "the parties agreed to a contractual method for calculating the energy charge, rather than a pure theoretical application of avoided costs"

(underscoring in the original). The ALJ thus indicated not that the parties contracted for other than avoided costs, but for something other than the methodology the QFs now urge for calculation of avoided costs.

The QFs protest that the ALJ "**concluded that 'Consumers' avoided costs . . . are irrelevant** in resolving this dispute" (boldface type and ellipsis in the original). However, the full version of the statement in question is "Consumers' avoided costs *of high sulfur coal or eastern bituminous coal* are irrelevant in resolving this dispute" (our emphasis). Again, the ALJ was not concluding that the concept of avoided costs was not relevant, but was instead recognizing that this was a question of contract language, and rejecting the QFs' interpretation of it.

The Commission in turn stated that "the ALJ's characterization that the QFs are seeking 'something other than avoided costs" was "not material to the outcome of this proceeding," because at issue was "the intent of the parties with regard to the payment of avoided energy costs." This language, at worst, exaggerated the position of the ALJ in the course of declaring it irrelevant.

The label attached to the payment methodology at issue hardly bears on the real issue, which is what the parties in fact agreed upon. QFs and electric utilities are free to contract to buy and sell power at any rates of their choosing. 18 CFR 292.301. The PPAs' declarations that the "energy payment rates to be paid by Consumers are based on the concept of 'avoided costs' as now described in Section 10 of [PURPA]" and applicable rules invokes the general concept of avoided

costs, not any specific methodology for calculating them.

For these reasons, we reject the QFs' characterization of "avoided costs" as the strict equivalent to "the costs of high-sulfur, bituminous coal," and join the PSC in looking to the PPAs themselves to determine what the parties agreed upon as the methodology for calculating avoided costs.

B. Bituminous or Sub-Bituminous Coal

The QFs argue that, because their proxy for purposes of calculating avoided costs was a bituminous-coal burning plant, the PSC erred in allowing Consumers to switch from bituminous to sub-bituminous coal as the proxy for avoided energy costs. We disagree.

The QFs' argument, that having decided upon a bituminous-coal-burning plant as the proxy for determining avoided capacity costs, the PSC forever required that attendant avoided energy costs be calculated on the basis of bituminous coal, is a strained one. Avoided capacity costs are determined all at once, while the PPAs call for determination of avoided energy costs on the basis of ongoing, actual coal consumption, as indicated by contractual language referring to "fuel inventory at the Base Plants during the Most Recent Calendar Year," and "Consumers' total fuel related expenses at the Base Plants . . . for the Most Recent Calendar Year." The parties were free to contract to determine capacity and energy costs in ways not entirely compatible with each other. As the PSC noted, had the parties intended that one

particular type of coal be "locked in" for the duration of the PPAs, regardless of actual coal consumption at the base plants, it would have been easy so to specify.

The Commission's order acknowledges that in earlier orders it "was careful to reject all contentions that Consumers' avoided capacity cost payments could be based on one type of plant while its avoided energy cost payments could be based on another," but explained that the instant case raised no such concern, because the same proxy facility was referenced for determining both avoided capacity and avoided energy costs. We agree that the rule against "split proxies" does not prevent a consistent arrangement such as the instant one, but an arrangement such as using a coal-fired plant to determine capacity payments and a nuclear-fueled plant to determine energy payments.

We further hold that the PSC had a reasonable evidentiary basis for concluding that the parties, at the time they entered into their respective PPAs, expressed no agreement concerning one kind of coal as opposed to another, and that this conclusion comports with the PURPA.

The PPAs' references to "[t]he average cost per kilowatthour . . . for fuel inventory at the Base Plants during the Most Recent Calendar Year," for which "fuel inventory cost" is to be calculated on the basis of "Consumers' total fuel related expenses at the Base Plants as set forth in its Power Supply Cost Recovery (PSCR) Monthly Reports or successor documents . . . for the Most Recent Calendar Year" plainly suggest a concern for actual coal costs, not what use of any particular kind of coal would cost.

Although 18 CFR 292.304(a)(1) sets forth the concept of "avoided costs," the rule does not require that avoided costs be calculated any specific way. 18 CFR 292.301(b)(1) provides that nothing in the applicable rules limits "the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required . . . ."

Because the PPAs call for calculating avoided energy costs on the basis of actual coal consumption at base plants, we approve the PSC interpretation reflecting a recognition that fuel costs change constantly, and that avoided energy costs are best determined by tying them to actual energy consumption costs as incurred over time.

The QFs assert that the PSC "erred in ignoring the unrebutted evidence that its prior orders accepted and ratified the Renewable QFs' election to have their avoided costs calculated 'up front' for the entire term of their PPAs," and that it also "accepted and ratified the Renewable QFs' election to lock in avoided costs." However, the PSC examined an earlier order involving Consumers[2] and correctly noted that it did not specify bituminous or any other kind of coal, and the QFs point to no other provision from that order that does. Instead, the order in question refers to "a rolling average of the cost of fuel and operation and maintenance expenses at Consumers' coal-fired generating units," which suggests actual, ongoing coal

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[2] Case No. U-8871 (1989).

costs.[3] Interpreting the instant PPAs as continuing to look to those actual, ongoing, coal costs as the basis for determining its avoided energy cost payments harmonizes that past decision with the instant one.

For these reasons, no conflict with the PSC's earlier decisions, or with the PPAs' references to the PURPA, resulted from interpreting the PPAs as basing avoided energy costs on actual coal costs, regardless of the kind of coal.

C. Ambiguity

The QFs argue that their PPAs were ambiguous for having left key terms undefined, and for setting forth terms beyond their four corners by incorporating by reference the PURPA and attendant regulations, and that the PSC improperly made selective use of extrinsic evidence to resolve the ambiguities. We disagree.

"Where the language of a contract is clear and unambiguous, the intent of the parties will be ascertained according to its plain sense and meaning." *Haywood v Fowler*, 190 Mich App 253, 258; 475 NW2d 458 (1991). A written contract is ambiguous if, after reading the entire document, its language can reasonably be understood in differing ways. See

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[3] Moreover, we can hardly disagree with the PSC's statement that "the Commission is in a far superior position viv-à-vis the ALJ, the QFs, or Consumers, to state exactly what was intended by the Commission's prior orders."

Bianchi v Automobile Club of Michigan, 437 Mich 65, 70; 467 NW2d 17 (1991).

The QFs assert that "[t]he ALI and MPSC . . . found the PPAs to be ambiguous for purposes of considering and accepting Consumers' parol evidence but not for purposes of considering and accepting the renewable QFs' parol evidence," citing two passages in the proposal for decision.

In the first instance cited, the ALJ stated that she "agrees with Consumers that merely recognizing the fact that a party has a differing interpretation of a contract provision does not create a reasonable ambiguity." Although the ALJ then goes on to mention witness testimony, the context shows that this was done not to resolve an ambiguity, but rather to confirm what the ALJ perceived as plain meaning.

In the second instance cited, the ALJ set forth testimony from Consumers' Director for Electric Transaction Strategies, and expressly afforded it "significant weight" as reflecting Consumers' experience in connection with the reasonableness of any expectations that Consumers would have continued to burn the same kind of coal for the life of the PPAs. Again, this was less to resolve an ambiguity than to confirm the conclusion that the PPAs' methodology was consistent with the PSC's previous avoided-cost determinations.

The PSC's order states that the PSC "is not persuaded the power purchase agreement language pertaining to avoided energy cost payments is unclear or ambiguous," and declares that the parties' intent "is

easily determined from a review of the four corners of the document." Accordingly, the PSC declined to resort to any contract interpretation principles appropriate for resolving ambiguities. In arguing this issue, the QFs point to no reliance on extrinsic evidence in that decision. Their argument that the PSC made improper selective use of extrinsic evidence is thus without merit.

The QFs assert that Consumers' Director for Electric Transaction Strategies admitted that the PPAs were ambiguous. In fact, in the testimony in question, that witness merely agreed that a person could urge a meaning other than what he understood. In particular, when asked if "someone could assert that their understanding of the term 'base plants' means base plants . . . as configured at the time the QFs and Consumers signed the Power Purchase Agreements and burned the type of fuel that they were then burning," the witness replied, "Well, I suppose someone could assert that." That response was not an assertion that ambiguity existed, but rather a qualified agreement that controversy could exist. However, "that each party is advocating a definition that supports its desired outcome in a case of first impression does not make a phrase ambiguous." *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 355 n 3; 596 NW2d 190 (1999).

To the extent that the PPAs state their intention to determine energy payment rates on the basis of "avoided costs" as described in the PURPA and attendant regulations, those references comport with the PPAs' own detailed terms for calculating avoided costs and the PSC's earlier decisional law. Neither

authority demands locking in bituminous coal as the only fuel considered for calculating avoided energy costs. The federal authorities are referenced in the PPAs not to introduce additional contract terms, but to declare an intention to comport with applicable law. Those references do not establish that the PPAs' own terms are not selfsufficient.

Nor are we persuaded by the argument that, because "coal" is not defined in the PPAs, reasonable persons could differ on whether the parties used that term strictly to refer to the bituminous coal then exclusively in use, or any of the various forms of coal including the lessexpensive sub-bituminous variety. The word "coal" is not subject to different definitions. One dictionary defines it as "[a] natural dark-brown to black solid used as a fuel, formed from fossilized plants and consisting of amorphous carbon with various organic and some inorganic compounds." *American Heritage Dictionary* (2d college ed, 1985), p 285. This concept is general enough to admit of variations in fuel efficiency and pollution potential. Bitumen is "[a]ny of various mixtures of hydrocarbons and other substances, occurring naturally or obtained by distillation from coal or petroleum . . . ." *Id.* at 183. Bituminous coal is a "mineral coal that burns with a smoky, yellow flame, yielding volatile bituminous constituents." *Id.* "Coal" is thus a general term, "bituminous coal" being one of the particulars under that broad umbrella. The presumption that contracting parties express their intent through the ordinary meanings of words, see *Haywood, supra*, means that the parties intended to speak broadly of "coal," in all its varieties, not that they used that general term to designate specifically "bituminous coal."

A tribunal need not resort to extrinsic evidence to take judicial notice that little is static in the energy production industry, in light of ever-changing or developing markets and legal rules.

For these reasons, the PSC correctly held that the PPAs are unambiguous, and thus that no resort to extrinsic evidence was appropriate to interpret them.

D. Consumers' Witness

The QFs argue that the PSC erred in accepting testimony from Consumers' Director for Electric Transaction Strategies. We disagree.

That witness testified that he had worked for Consumers as an engineer since 1976, and that, since 1997, he was responsible for developing strategies to manage Consumers' exposure to financial risks connected with its generating units and purchases of capacity from others.

The QFs emphasize that the witness admitted that he had no involvement in the negotiation, drafting, or execution of the PPAs in question. However, the PSC's interpretation of the PPAs did not depend on that witness's testimony concerning the parties' understanding during negotiations, but rather took into account the witness's testimony from his administrative perspective, providing background information on behalf of his employer. The ALJ specifically characterized that testimony as reflecting "Consumers' actual experience," not the witness's own.

For these reasons, we conclude that the PSC properly denied a motion to strike the testimony in question.

E. Funds Dating from 1998 to 2003

The order appealed from includes the following:

> [W]ith regard to the QFs' complaint . . . that the ALJ completely ignored their argument that Consumers unjustly enriched itself over a period of six years at the expense of the QFs, it is sufficient to note that this proceeding is limited to Consumers' 2004 PSCR plan and the period of time covered by the QFs' unjust enrichment argument relates to 1998 to 2003. Accordingly, the ALJ properly ignored this issue. The Commission, however, is not in a position to abrogate the contractual commitments of parties, even if this proceeding did address the 1998-2003 timeframe.

The QFs, citing equitable principles, argue that Consumers obtained a windfall from its ratepayers from 1998 to 2003, by collecting from them funds to cover the costs of bituminous coal while in fact compensating the QFs at a rate or rates based on less expensive sub-bituminous coal, and demand the equitable remedy of a constructive trust.

However, the QFs cite no authority for the proposition that the PSC is empowered to provide any equitable remedy. The PSC possesses only that authority granted to it by the Legislature. *Attorney General v Public Service Comm*, 231 Mich App 76, 78;

585 NW2d 310 (1998). The caselaw consistently recognizes that, where some aspect of an order of the PSC demands equitable relief, the circuit court retains that power. See *City of Marshall v Consumers Power Co*, 206 Mich App 666, 680-681; 523 NW2d 483 (1994); *Attorney General, supra*, 165 Mich App at 235-236. Accordingly, even if the QFs could establish that it was entitled to some equitable relief in connection with their PPAs, the PSC properly held that it "is not in a position to abrogate the contractual commitments of parties. . . ."

The QFs additionally complain that the PSC required them to litigate this issue in this 2004 case, but then refused to decide it because it related to the several years preceding 2004. We disagree with that characterization of what transpired below.

The QFs filed a motion to strike and to limit the scope of proceedings on December 12, 2003, and attached their first amended complaint then pending in circuit court, which set forth the allegation that, since 1998, Consumers was underpaying the QFs for the reasons we rejected above concerning the kind of coal referenced in determining avoided costs. The motion requested that the PSC, in deference to the circuit court action, "deny Consumers' request for declaratory ruling and strike its supplement to application and supporting testimony and exhibits." The ALJ denied the motion, and the PSC denied leave to appeal.

Citing this history, the QFs assert that they were required to litigate their issues from years preceding 2004 in the instant case. However, the QFs

acknowledge in their brief that MCL 460.6j does not authorize the PSC to resolve the QFs' claims for 1998 through 2003 in a 2004 PSCR case.

In fact, the ALJ's denial of the motion to limit the scope of proceedings anticipated the circuit court's decision to dismiss the action before it in deference to the PSC's primary jurisdiction. This Court's subsequent determination that the circuit court should stand prepared to resolve all claims not decided by the PSC, *Adrian Energy Assoc v Consumers Energy Co*, unpublished opinion per curiam of the Court of Appeals, issued November 3, 2005 (Docket No. 255319), slip op at 1, harmonizes with the ALJ's determination not to narrow the issues before it in deference to the circuit court.

In fact, this Court's earlier decision addressed the pre-2004 issues:

> The MPSC expressly declined to dispose of plaintiffs' claims arising between 1998 and 2003, as the proceedings then before it only involved defendant's proposed PSCR plan for 2004. It appears from the record that the MPSC's determination that defendant did not under-compensate plaintiffs eliminates any support for plaintiffs' claims. However, the trial court should make that determination upon a more comprehensive review. [*Id.*, slip op at 8.]

This Court's earlier approval of the PSC's eschewing of the 1998-2003 issues, while noting that if they had any merit it would be for the circuit court

eventually to determine, now stands as the law of the case.

F. Nature of the Proceeding

The QFs argue that ALJ violated their due process right to notice in sua sponte converting a proceeding for a declaratory ruling into a contested case proceeding. We disagree.

Proceedings before the PSC in this case began when Consumers filed an application for approval of a PSCR plan and monthly PSCR factors for 2004. A supplemental application followed two weeks later, announcing the existence of a contract dispute, and seeking "a declaratory ruling, pursuant to Rule 701 of the MPSC's Rules of Practice and Procedure, R 460.17701, confirming that Consumers Energy is properly calculating the energy charges payable pursuant to certain power purchase agreements between Consumers Energy and various qualifying facilities. . . ."

At a motion hearing before the ALJ, the QFs recounted, "This case originally started out as a PSCR case. And then Consumers, two weeks later, files . . . a declaratory judgment case asking to do both the PSCR and the declaratory ruling case." This case then proceeded to the ALJ's proposal for decision on October 7, 2004, and the PSC's final order in the matter of February 28, 2005.

In denying the QFs' motion to limit the scope of proceedings, the PSC stated as follows:

> The Commission finds that it has broad statutory authority to determine payment methods important to PSCR plan cases. The rate that Consumers pays the QFs is a relevant factor in determining Consumers' power cost; therefore, it is relevant in this case.
>
> The Commission finds that the QFs have not been deprived of due process. The original application and testimony filed by Consumers gave the QFs notice that their contracts were at issue in this case.
>
> Therefore, the Commission agrees with the ALJ's findings that the cost of power purchased from the QFs is relevant to the determination of the PSCR plan and properly before the Commission. The Commission also finds that the QFs were given proper notice and an opportunity to be heard. . . . The issuance of a declaratory ruling, as requested by Consumers, is not required because the cost of QFs power was properly noticed.

The QFs cite authority for the proposition that a party is entitled to notice, and opportunity to respond, in connection with proceedings involving that party, but do not say how much time, beyond the many months between proceedings as described above, they needed to adjust to having the subject matter of the request for a declaratory ruling merged into the PSCR case, or what opportunities were lost because of deficient notice, or otherwise explain why the notice they actually received concerning the progress of this case prejudiced their ability to present their position.

"A party may not merely announce his position and leave it to us to discover and rationalize the basis for his claim." *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). Because the QFs fail to show that they lost any opportunities, or otherwise lacked adequate time to participate gainfully in these proceedings, as the result of the ALJ's and PSC's decision to consider all issues before it in the context of a PSCR case, we reject this claim of error.

G. Discovery

The QFs make an issue of the denial of three motions to compel discovery, but provide little indication what the substance of any such motions were, or why they were denied. Moreover, in challenging the PSC's decision to deny leave to appeal the ALJ's decision in that regard, the QFs rely on mere generalizations, taking issue with none of the PSC's specific findings. Nothing in QFs' brief even attempts to describe, or make an offer of proof concerning, what relevant facts the QFs were unable to address because discovery was limited. As with the previous issue, this argument fails for want of proper presentation. A party may not leave it to the appellate court to "'unravel and elaborate for him his arguments . . . .'" *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). See also *In re Toler, supra*. Because the QFs merely announce that their rights were violated, without explaining precisely how, we must reject this claim of error.

IV. Federal Law

The QFs initially asserted that they were reserving issues relating to federal law for adjudication in a federal forum. The United States district court dismissed their federal claims in this matter without prejudice, on the ground that it expected the adjudication in this state to comport with federal requirements. The Sixth Circuit Court of Appeals in turn affirmed the decision not to exercise jurisdiction, but remanded the case to the district court with instructions to stay the proceedings until the conclusion of the state litigation. *Adrian Energy Assoc v Michigan Public Service Comm*, 481 F3d 414, 416 (CA 6, 2007). The Sixth Circuit declared that "[p]laintiffs' pending state court action, along with the stay of the federal action, gives plaintiffs an adequate judicial forum to air their grievances, including any federal claims." *Id.* The court additionally declared as follows:

> We briefly address plaintiffs' claim that the Michigan Public Service Commission's February 28 Order conflicts with the Federal Power Act, the [PURPA] and regulations of the Federal Energy Regulatory Commission, and is therefore void by virtue of the Supremacy Clause of the United States Constitution. We agree, of course, that the Supremacy Clause bars states from acting within a zone of *exclusive* federal jurisdiction. However, none of the issues raised by plaintiffs in their complaint concerning the February 28 Order fall within the mandatory jurisdiction of the [FERC] or the federal courts. Plaintiffs do not contend in their

> complaint that the State of Michigan has improperly implemented the Acts in conflict with federal law; instead they challenge only the Michigan Public Service Commission's *interpretation* of the terms of the Power Purchase Agreements. Such challenges to a State's interpretation of a [PPA] are generally not preempted by federal law or regulations. Moreover, the state courts are fully competent to, and often do, address and correctly apply relevant federal law or regulations to the cases in their courts. [*Id.* at 420 n 6 (italics retained, citation omitted).]

The Sixth Circuit thus noted that the QFs did not allege any actual conflicts with federal law, but instead raised issues of only contract interpretation, which the PSC was fully competent to decide.

The QFs then successfully moved this Court to withdraw their issues from federal court and submit them with this appeal. After oral argument, this Court granted the QFs' motions for supplemental briefing specifically addressing their federal claims. The QFs put forward four arguments: (1) that the PSC erroneously declared that the PURPA and attendant regulations were irrelevant and immaterial, (2) that the PSC improperly subjected the PPAs to review for reasonableness and prudence, (3) that the PSC improperly revised its earlier orders relating to the PPAs, and (4) that the decision below resulted in unlawful discrimination against the Qfs.

A. Relevance of Federal Law

The PSC did not, in fact, declare federal law to be irrelevant or immaterial in this matter. Instead, as discussed in Part III-A, *supra*, the PSC never lost sight of any applicable federal authority, but instead recognized that the federal authorities allowed utilities and QFs to contract for energy purchases, including how avoided costs would be calculated, and thus that the language of the PPAs, instead of regulatory default rules, governed in this instance.

The QFs emphasize that 18 CFR 292.304(d)(2) calls on QFs to decide between basing rates on (1) "avoided costs calculated at the time of delivery," or (2) "avoided costs calculated at the time the obligation is incurred." The QFs further note that their PPAs reference a fixed proxy plant for purposes of calculating avoided capacity costs, and argue that avoided fuel costs must likewise reflect the election to calculate costs on the basis of what existed when the contracts were executed. However, 18 CFR 292.301(b)(1) provides that nothing in the applicable rules limits "the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required. . . ."

The QFs again emphasize that most of the PPAs expressly refer to "avoided costs" as set forth in the PURPA and attendant regulations, suggesting that the PPAs contained a regulatory formulation for determining them, despite the detailed contractual language covering that ground. However, those PPAs do not strictly invoke "avoided costs" as spelled out in

the regulations, but rather "the concept of avoided costs." That broader wording indicates that the PPAs were intended to comport with the regulations, not that the specific, agreed-upon contractual terms were to be forfeited to regulatory default methodology.

For these reasons, this issue has no merit.

B. Reasonableness and Prudence

The QFs point out that federal regulations afford the QFs considerable insulation from state regulation. See 18 CFR 292.602(C)(1)(i) ("Any qualifying facility shall be exempted . . . from State laws or regulations respecting . . . [t]he rates of electric utilities"). The QFs cite authority for the proposition that "[s]tate commissions may not review existing PURPA contracts for reasonableness and prudence, particularly when doing so would have the effect of over-ruling the FERC's avoided cost rule." Our review of the cases cited indicates that they stand for the more general rule that the PURPA preempts a state commission from using its regulatory authority to modify the terms of a contract for avoided costs that has already been approved and put into effect.

However, the FERC itself has stated,

> It is up to the States, not this Commission, to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law. Similarly, whether the particular facts applicable to an individual QF necessitate modifications of other terms and

> conditions of the QF's contract with the purchasing utility is a matter for the States to determine. This Commission does not intend to adjudicate the specific provisions of individual QF contracts. [*West Penn Power Co*, 71 FERC p 61,153, 61,495 (1995) (footnote omitted).]

In this case, the ALJ's proposal for decision included the statement, "the QFs' interpretation [of the PPAs, locking in bituminous coal for purposes of calculating avoided energy costs] would unreasonably restrict Consumers' ability to comply with its statutory obligation to take actions to minimize its cost of fuel, pursuant to MCL 460.6j(3) and (6)." The PSC in turn, in crediting Consumers' decision to place greater reliance on sub-bituminous coal, stated, "Consumers is legally obligated by [MCL 460.6j] to take all appropriate steps to minimize coal costs charged to its PSCR customers. Consumers' failure to pursue appropriate measures to reduce its PSCR expenses could be deemed unreasonable or imprudent conduct that could lead to the disallowance of costs . . . ." Previously, while asserting its jurisdiction in this matter, the PSC stated,

> The Commission has an obligation pursuant to [MCL 460.6j] to review the reasonableness and prudence of Consumers' plans to acquire fuel and purchased power to meet the needs of its retail customers during 2004. Therefore, the reasonableness and prudence of the prices to be paid to the QFs under their power purchase agreements with Consumers are clearly matters that the Commission may review in a PSCR plan proceeding. Moreover, under PURPA the

> Commission is charged with determining Consumers' avoided cost.

The PSC thus resorted to the reasonableness inquiry not to guide its interpretation of the PPAs, but to confirm the soundness of the chosen interpretation on its face. The PSC simply recognized the legitimacy of Consumers' shifting to greater reliance on sub-bituminous coal. The PSC's assertion of jurisdiction concerned an assessment of the reasonableness of a PSCR plan, not of the terms of existing PPAs.

The QFs assert that the PSC held that Michigan law "required Consumers to minimize its fuel costs and to calculate the Plaintiff QFs' energy rate on the basis of those minimized fuel costs, without regard to consumers' federal obligation to pay the Plaintiffs avoided costs. . . ." However, the PSC did not declare that state law, demanding reasonableness and prudence, *required* the interpretation of the PPAs that the PSC afforded, but instead simply noted that its interpretation of the language of the PPAs comported with that requirement. The QFs complaint that there has been some deviation from the requirement that the QFs be paid avoided costs, was discussed and rejected in Part III-B. We need not revisit it here.

C. Prior Orders and Discrimination

In arguing that the PSC improperly deviated from its earlier orders in allowing Consumers to pay energy costs based on the actual sub-bituminous coal in use, while maintaining capacity payments reflecting an unmodified bituminous-coal burning-plant, the QFs

effectively reiterate their argument, rejected in Part III-B, that the result was to split the proxy.

16 USC 824a-3(e)(1) authorizes the FERC to "prescribe rules under which . . . [QFs] are exempted in whole or part from . . . State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, . . . if the Commission determines such exemption is necessary to encourage cogeneration and small power production." 18 CFR 292.602(c)(1), in turn, provides that QFs are indeed exempt from state laws or regulations governing the rates, or financial and organizational regulation, of electric utilities. Subsection (b)(2) provides that the rules thus prescribed, in requiring utilities to offer to purchase electricity from QFs, "shall not discriminate against qualifying cogenerators or qualifying small power producers."

Once a state commission has approved a PPA between a QF and a utility, as consistent with avoided costs, any action by the state commission to reconsider that approval, or to prevent the utility of passing those rates on to its customers, on the basis of state authority is preempted by federal law. See *Freehold Cogeneration Assoc, LP v Bd of Regulatory Comm'rs of NJ*, 44 F3d 1178, 1194 (CA 3, 1995).

In this case, the PSC did not superimpose state regulations concerning rates, or otherwise reinterpret, the PPAs in question. Instead, it simply recognized that those agreements based avoided energy costs on rolling-average costs of coal actually consumed, while

not limiting that calculation to any one of several kinds of coal.

As noted above, this constitutes no splitting of the proxy, because the same facility is referenced for determining both avoided capacity and avoided energy costs. What is prohibited is an arrangement such as using a coal-fired plant to determine capacity payments and a nuclearfueled plant to determine energy payments. This concern does not arise in this instance.

Nor does the analysis change if these assertions concerning splitting the proxy are recast as discrimination against QFs who unsuccessfully sought more favorable interpretations of their contracts. All QFs in this action are treated identically in this regard.

D. Conclusion

The separate presentation and argument relating to federal authorities has added nothing of significance to the related discussions occurring earlier in this opinion. The QFs merely repeat their assertions that the applicable federal authorities favor their interpretation of "avoided costs" as used in the PPAs, while again failing to show that the decision below does not comport with those authorities. No appellate relief is warranted.

V. Docket No. 261747

A. Rate Caps and the PSCR Factor

The Attorney General first argues that the PSC incorrectly interpreted the statute capping residential, and small commercial and industrial, rates as allowing appellee Consumers Energy to adjust its PSCR factors upward provided that those customers' overall rates were not increased. Binding authority now holds otherwise.

MCL 460.10d(1) states that, but for an exception not applicable here,

> the commission shall establish the residential rates for each electric utility with 1,000,000 or more retail customers in this state as of May 1, 2000 that will result in a 5% rate reduction from the rates that were authorized or in effect on May 1, 2000. Notwithstanding any other provision of law or commission order, rates for each electric utility with 1,000,000 or more retail customers established under this subsection become effective on June 5, 2000 and remain in effect until December 31, 2003 and all other electric retail rates of an electric utility with 1,000,000 or more retail customers authorized or in effect as of May 1, 2000 shall remain in effect until December 31, 2003.

Subsection (2) continues as follows:

> On and after December 31, 2003, rates for an electric utility with 1,000,000 or more retail

> customers in this state as of May 1, 2000 shall not be increased until the earlier of December 31, 2013 or until the commission determines, after notice and hearing, that the utility meets the market test under [MCL 460.10f] and has completed the transmission expansion provided for in the plan required under [MCL 460.10v]. The rates for commercial or manufacturing customers of an electric utility with 1,000,000 or more retail customers with annual peak demands of less than 15 kilowatts shall not be increased before January 1, 2005. There shall be no cost shifting from customers with capped rates to customers without capped rates as a result of this section. In no event shall residential rates be increased before January 1, 2006 above the rates established under subsection (1).

The Attorney General reports that the PSC set a PSCR factor of $0.00257 per kilowatt hour (kWh) for Consumers' residential customers, and of $0.0027 per kWh for commercial and manufacturing customers with annual peak demands of less than 15 kilowatts. The PSC reports that Consumers requested approval of a PSCR factor for 2004 of $0.00449 per kWh for the purpose of recovering its power supply costs, but then sought approval for a modified PSCR factor of $0.00350 per kWh for residential customers, and of $0.00379 per kWh for small commercial and industrial customers, on the ground that the surcharge for the decommissioning of the Big Rock nuclear plant would expire at the beginning of 2004, and thus the PSCR factor to be applied to the capped customers should be

increased by the amounts reflecting the former decommissioning surcharge.

The Attorney General protested that Consumers should not be allowed to increase the PSCR factors for residential or small commercial and industrial customers above the levels established in 2000 to balance the termination of the decommissioning surcharge.

In approving Consumers' plan and proposed PSCR factor, the PSC stated that the applicable rate cap did not foreclose netting increases against decreases, and reported the expectation that Consumers' customers would only be charged a PSCR factor that would recover as much of its PSCR expenses as was consistent with the rate caps.

The Attorney General argues that the term "rates" in MCL 460.10d(2) refers to each individual component of a rate charged by a utility, and that each component is thus capped under the statute. This Court recently rejected this argument as "untenable," on the ground that otherwise "the PSC could not change a utility's rate under any circumstances during the period in which the rate was capped." *In re Application of Detroit Edison Co*, 276 Mich App 216, 227; ___ NW2d ___ (2007), lv pending. This Court observed that MCL 460.10d(8) prohibits the PSC, for the period specified in subsection (2), from authorizing any fees or charges that would cause the residential rate reduction required under subsection (1) to fall below a specified percentage, and decreed that the PSC may "authorize raises in individual components of a rate as long as the raises do not increase an overall rate above the

(reduced) rate mandated by the legislature as set forth in MCL 46010d(1) and the capped rate mandated by MCL 460.10d(2)." *Id.*

Because the latter case confirms the PSC's judgment as regards this issue, we reject this claim of error on that basis.

B. Transmission Costs

The Attorney General argues that the PSC erred in allowing Consumers to include transmission costs among those to be recovered through the PSCR factor. Binding authority again now holds otherwise.

This Court has held that "[n]either . . . MCL 460.6j nor any accounting rule prohibits an adjustment to a PSCR clause to account for transmission costs," and that, "[o]bviously, power must be transmitted for it to be distributed to a utility's customers." Accordingly, "[p]ayments made . . . for transmission costs, which are made to comply with federal law, are necessarily 'transportation costs,' and therefore are properly recoverable in a PSCR clause. *In re Application of Detroit Edison Co, supra* at 229, citing MCL 460.6j(1)(a). The PSC's practice of allowing a utility to recover transmission costs in a PSCR proceeding thus falls within its broad ratemaking authority. *Id.* The PSC's reassertion of authority to include transmission costs in the instant PSCR clause is appropriate.

The Attorney General alternatively asserts that if the PSC has the general authority to allow transmission costs to be included in PSCR calculations, it was nonetheless unreasonable to do so

in this instance. All the Attorney General provides for this alternative position is general argument relating to policy considerations, not the particulars of this case

Because the PSC has the authority to allow recovery of transmission costs through a PSCR factor, and because the Attorney General fails to show that its decision to do so in this instance was unreasonable, we reject this claim of error.

VI. Docket No. 261747

A. Rate Caps and the PSCR Factor

The Michigan Environmental Council and the Public Interest Research Group in Michigan (MEC/PIRGIM) first present an argument parallel to that of the Attorney General concerning the PSC's decision to allow Consumers to adjust its PSCR factor by amounts commensurate with expired decommissioning surcharges. Because we resolved this issue in Part IV-A, we need not re-address it here.

Beyond general objections to "backfilling," as the parties occasionally call this practice, MEC/PIRGIM argue that, in this instance, the PSCR factor was increased without reference to any actual costs statutorily authorized for recovery through that mechanism. See MCL 460.6j(1). However, Consumers' Supervisor of Planning and Financial Analysis stated as follows:

> In my direct testimony, I explained that, although the Company proposed use of a $0.00449 per kWh PSCR factor, it would only

> apply that factor up to the appropriate caps for residential and small commercial and industrial . . . customers. I also noted that, to the extent any other, non-PSCR rate decreases took effect during 2004, this would affect the amount of the proposed $0.00449 per kWh PSCR factor that the Company would apply for the capped customers. Because the Big Rock nuclear decommissioning surcharge will no longer be in effect starting January 1, 2004, the amount of the PSCR factor that will be applied to the capped customers will increase by the amount of the terminated decommissioning surcharge. This will not result in an increase to the total rate, which is capped per 2000 PA 141.[4]

Appellants do not argue that Consumers wholly failed to support its initial position that a PSCR factor of $0.00449 per kWh was needed. Consumers' witness's testimony provided substantial evidence to support the conclusion that, under the rate caps, its PSCR factor was lower than would compensate Consumers' for its actual, otherwise recoverable, energy costs, and that the expiration of the decommissioning surcharge invited an upward adjustment in the PSCR factor so that it better reflected those costs.[5]

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[4] 2000 PA 141, sometimes referred to as "Act 141," along with its companion, 2000 PA 142, amended the public service commission act, grafting onto it the Customer Choice and Electricity Reliability Act. MCL 460.10 *et seq.*

[5] The PSC reported on the basis for Consumers' general request for a factor of $0.00449 per kWh, and that the upward adjustments occasioned by the expiration of the decommissioning

B. Costs of Spent Nuclear Fuel

MEC/PIRGIM argue that the PSC erred in striking substantial portions of the evidence offered by their expert concerning the management of spent nuclear fuel, then including the disposal costs of such fuel in the resulting rates. However, this Court has held that "in the absence of evidence that [the utility] acted unreasonably and imprudently with regard to the collection of [spent nuclear fuel] costs, [the PSC] had no authority to impose additional remedies such as those suggested by appellants." *In re Application of Indiana Michigan Power Co*, 275 Mich App 369, 375; 738 NW2d 289 (2007). See also *id.* at 379-380 ("Appellants cite no statute or caselaw that holds that in a PSCR proceeding in which no finding that a utility engaged in unreasonable or imprudent conduct has been made, the PSC is authorized to go beyond approving the PSCR application to adopt remedies such as those suggested by appellants.").

Because this Court has held that consideration of appellants' recommendations and proposed remedies connected with disposal of spent nuclear fuel is beyond the scope of a PSCR proceeding, the PSC did not err by striking such recommendations and proposed remedies in this instance.

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surcharges, as limited by the statutory overall-rate caps, brought residential customers a PSCR factor of $0.00350 per kWh, and small commercial and industrial customers a factor of $.00379, both falling below the $0.00449 for which Consumers demonstrated a need.

MEC/PIRGIM raise several additional issues in connection with how the PSC treated costs relating to the disposal of spent nuclear fuel, based on a contract with the federal Department of Energy. We need not address those issues here, however, because they have been decided, uniformly in favor of the PSC's position, in an earlier, binding case of this Court. *In re Application of Detroit Edison Co*, *supra* at 240-241, citing *In re Application of Indiana Michigan Power Co*, *supra*. In this case, the PSC correctly disposed of these issues below by reiterating that questions relating to the costs of disposal of spent nuclear fuel were beyond the scope of its proceedings.

C. Precedents

MEC/PIRGIM argue that the PSC over-relied on nonbinding precedents in reaching its decision in this case. We disagree.

In discussing appellants' exceptions to the proposal for decision, the PSC cited two of its earlier cases, and this Court's unpublished opinion affirming them. The PSC expressed its intention to decide appellants' issues in harmony with those decisions.

This Court has recently reaffirmed that recourse to existing PSC decisions, and this Court's unpublished affirmances of them, is proper consultation of persuasive, though not binding, authority. *In re Application of Detroit Edison Co*, *supra* at 229 n 14 and accompanying text; *In re Application of Indiana Michigan Power Co*, *supra* at 380-381. Appellants cite no statement of the PSC that suggests that the PSC mistakenly treated this Court's unpublished decisions

as mandatory, instead of persuasive, authority, and we have found none. The PSC thus did not err in deciding the instant case so as to comport with its earlier affirmed decisions.

VII. Conclusion

For the reasons discussed above, we affirm each of these three consolidated cases in its entirety.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Deborah A. Servitto

APPENDIX T

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED

[Filed December 9, 2003]

No. 240403
MPSC
LC No. 00-012613

MICHIGAN ENVIRONMENTAL COUNCIL and PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN,
Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION and WISCONSIN PUBLIC SERVICE CORPORATION,
Appellees.

No. 240406
MPSC
LC No. 00-012615

MICHIGAN ENVIRONMENTAL COUNCIL and PUBLIC INTEREST RESEARCH GROUP IN

MICHIGAN,
Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION and WISCONSIN ELECTRIC POWER COMPANY,
Appellees.

Before: Whitbeck, C.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

In these consolidated cases appellants Michigan Environmental Council and Public Interest Research Group in Michigan appeal as of right orders entered by the Michigan Public Service Commission (PSC) approving 2001 power supply cost recovery (PSCR) plans filed by appellees Wisconsin Public Service Corporation (WPSC) and Wisconsin Electric Power Company (WEPC). We affirm in each case.

I. Introduction

MCL 460.6j authorizes the PSC to include a PSCR clause in a utility's rate schedule.[1] A PSCR clause allows a utility to charge customers for the anticipated costs associated with the supply of power, and to recover "the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing

[1] MCL 460.6j was added by 1982 PA 304 (Act 304).

costs" of fuel used to generate electric power "incurred under reasonable and prudent policies and practices." MCL 460.6j(1)(a). Each year a utility with a PSCR clause in its rate schedule must file a PSCR plan for the upcoming year and a fiveyear forecast of power supply requirements. MCL 460.6j(3) and (4). The PSC approves, disapproves, or modifies the proposed PSCR plan. MCL 460.6j(6). After the end of the year the PSC conducts a reconciliation phase in which it makes adjustments to take into account the true cost of supplying power. MCL 460.6j(12) and (13).

The WPSC and the WEPC own and operate nuclear generating plants that supply electricity to Michigan residents. Spent nuclear fuel (SNF) is stored at on-site facilities at the plants. Both the WPSC and the WEPC entered into a Standard Contract with the Department of Energy (DOE), as required by the Nuclear Waste Policy Act of 1982 (NWPA), 42 USC 10101 *et seq*. Under the contracts the utilities pay a fee to the DOE for a federal SNF disposal program. This program was scheduled to begin no later than January 31, 1998. Currently, the DOE estimates that the program will begin in 2010. The utilities classify the SNF fee as a nuclear fuel expense and includes the cost in their PSCR plans.

II. Underlying Facts and Proceedings

The WPSC and the WEPC filed applications seeking approval of PSCR plans for the year 2001. In each administrative proceeding appellants presented the testimony of a nuclear energy consultant who expressed concerns regarding the DOE's SNF disposal program, and contended that neither the WPSC nor

the WEPC had responded in a sufficient manner to address those concerns. The witness noted that ratepayers were being charged extensive costs associated with nuclear waste and disposal, including the cost of the SNF disposal fees paid to the DOE, and asserted that given the possibility that the federal government would never implement a SNF disposal program, the PSC was authorized and obligated to take steps to protect the state's ratepayers and long-term interests. The witness asserted that the PSC was authorized to review the reasonableness and prudence of the utilities' actions in administering their contracts with the DOE, and to determine whether the utilities were taking all appropriate steps to protect ratepayers. The witness recommended that the PSC adopt several remedies to ensure that utilities in general and the WPSC and the WEPC in particular shared in the financial risk of SNF disposal, including: filing more detailed reports regarding their monitoring of the problem; placing PSCR revenues collected for the payment of SNF fees in escrow accounts to fund alternative disposal programs if the federal government failed to fulfill its obligations; modifying nuclear decommissioning funds to provide for the disposal of SNF; and obtaining performance bonds or insurance policies to ensure proper performance of SNF disposal. The witness did not identify as unreasonable or imprudent any action taken by either the WPSC or the WEPC.

Both the WPSC and the WEPC presented a witness who testified that the utility had taken reasonable and prudent steps to manage the storage and disposal of SNF. Each utility indicated that it continued to make SNF fee payments to the DOE as required by the

Standard Contract, and had been advised that suspending those payments could result in a loss of plant licensure and the future ability to have the DOE dispose of SNF. Each utility had determined that storing SNF at an on-site facility was the most cost-effective option.

The PSC affirmed the PSCR plans filed by the WPSC and the WEPC. The PSC acknowledged that the issues surrounding the disposal of SNF were significant and that a solution would not be implemented in accordance with the DOE's contractual timetable, but found that the remedies proposed by appellants were not necessary to correct any showing of unreasonable or imprudent action by the WPSC or the WEPC, and that neither the WPSC nor the WEPC acted in an unreasonable or imprudent manner. Finally, the PSC concluded that appellants' proposals were beyond the scope of a PSCR proceeding. The PSC denied appellants' motions for rehearing.

III. Analysis

The standard of review for PSC orders is narrow and well defined. MCL 462.25 provides that all rates, fares, charges, classifications and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Michigan Consolidated Gas Co v Public Service Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow

a mandatory statute or abused its discretion in the exercise of its judgment. *In re MCI Telecommunications Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). An order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc v Public Service Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966).

A reviewing court must give due deference to the PSC's administrative expertise, and is not to substitute its judgment for that of the PSC. *Attorney General v Public Service Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). However, a reviewing court cannot abandon its responsibility to interpret statutory language and ascertain legislative intent. *Miller Bros v Public Service Comm*, 180 Mich App 227, 232; 446 NW2d 640 (1989). Statutory interpretation is a question of law subject to de novo review. As a general rule, this Court will defer to the construction placed on a statute by the government agency charged with interpreting it, unless the agency interpretation is clearly erroneous. *In re Canales Complaint*, 247 Mich App 487, 496; 637 NW2d 236 (2001). Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Michigan*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

First, appellants argue that the PSC erred in concluding that consideration of their recommendations and proposed remedies was beyond the scope of its jurisdiction in a PSCR case. They note that a PSCR proceeding is designed to protect ratepayers by prohibiting a utility from charging ratepayers for costs incurred due to unreasonable or

imprudent practices, and contend that because the PSC has the statutory authority to allow or disallow costs in a PSCR proceeding, it logically follows that it has the authority to impose lesser included remedies.

The PSC possesses only that authority granted to it by the Legislature. *Attorney General v Public Service Comm*, 231 Mich App 76, 78; 585 NW2d 310 (1998). The statutes that confer power on the PSC must be strictly construed. Authority must be granted by clear and unmistakable language. A doubtful power does not exist. Words and phrases in the PSC's enabling statutes must be read narrowly and in the context of the statutory scheme. *Consumers Power Co v Public Service Comm*, 460 Mich 148, 155-159; 596 NW2d 126 (1999).

The PSC correctly interpreted the scope of the authority granted to it under MCL 460.6j(6). The issue before the PSC was not whether it has the power to regulate a public utility or to determine whether a utility's actions with respect to SNF are reasonable and prudent. Pursuant to MCL 460.6, the PSC has the power to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities. Rather, the issue the PSC was required to resolve in these cases was whether it is authorized to impose extraordinary remedies in the context of a PSCR hearing. Pursuant to MCL 460.6j(6), the PSC is required to evaluate the reasonableness and prudence of a utility's PSCR plan, and to approve, disapprove, or modify the plan based on its conclusions. In the instant cases the WPSC and the WEPC included costs related to SNF disposal and

payment of the SNF fees in their PSCR applications. The PSC did not presume that SNF costs were subject to automatic recovery, but rather scrutinized the costs requested by the utilities in contested case proceedings. Appellants did not allege, and the PSC did not find, that the WPSC and the WEPC acted unreasonably or imprudently with respect to issues related to SNF disposal and payment of SNF disposal fees to the DOE. Appellants have cited no authority that holds that in a PSCR proceeding in which no finding that a utility engaged in unreasonable or imprudent conduct has been made, the PSC is authorized to go beyond approving the utility's PSCR application and adopt a remedy such as those recommended by appellants. The PSC correctly concluded that if it determines that a utility's actions are reasonable and prudent it must allow the costs requested in the plan, and has no authority to adopt extraordinary remedies such as those proposed by appellants. MCL 460.6j(6); *Attorney General v Public Service Comm, supra.*

Contrary to appellants' assertion, the PSC's conclusion that imposition of the remedies requested by appellants is beyond the scope of a PSCR proceeding is not contrary to the legislative intent of an Act 304 proceeding. MCL 460.6j(6) does not authorize the PSC to take action such as that suggested by appellants absent a finding of unreasonable or imprudent action by a utility. The PSC's reasoning for its ruling was succinctly and correctly set out in its statement in each case that the scope of appellants' proposed remedies were beyond the scope of a PSCR proceeding. The PSC's statements reflect a correct interpretation and application of MCL

460.6j(6) in cases in which no unreasonable or imprudent conduct is found, and that interpretation and application is entitled to deference. *Canales, supra*. The PSC's orders are not unlawful or unreasonable. MCL 462.26(8).

Next, appellants argue that the PSC's findings that the WPSC and the WEPC acted reasonably and prudently with respect to SNF disposal costs are unexplained and are not supported by the requisite evidence. Appellants assert that the PSC ignored their evidence that the utilities had failed to grasp the enormity of the potential problems with SNF disposal.

We disagree. The WPSC's witness testified that the WPSC had taken reasonable and prudent steps to manage the storage and disposal of SNF. The decision to continue paying the SNF fee to the DOE was based on a warning from the DOE that the failure to pay the fee could result in the WPSC being deemed ineligible to utilize DOE storage facilities. The decision to store SNF at an on-site facility was based on factors of cost and efficiency. Appellant's witness did not testify that the WPSC acted in an unreasonable or imprudent manner. The WEPC's witness gave testimony that was substantially similar to that given by the WPSC's witness. Appellant's witness did not testify that the WEPC acted in an unreasonable or imprudent manner. In its decisions the PSC considered the remedies proposed by appellants, but concluded that in a PSCR proceeding the critical determination was whether a decision such as that to continue paying the SNF fee and to store SNF at an on-site facility was reasonable and prudent. The PSC did not decline to review ratemaking issues but rather properly applied

MCL 460.6j(6) and, contrary to appellants' assertion, did not presume that the utilities' requested SNF disposal costs were automatically recoverable. The PSC's orders are not unlawful or unreasonable. MCL 462.26(8).

Finally, we note that appellants' argument that their proposed remedies are not preempted by federal law, in particular the NWPA, was not raised before or addressed by the PSC, and thus is not properly before us. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). The PSC did not consider or rely on the doctrine of federal preemption as a basis for its decision that imposition of the remedies suggested by appellants is beyond the scope of a PSCR proceeding in which no finding of unreasonable or imprudent action is made. The issues raised by plaintiffs are appropriate for consideration, but not in a power supply cost recovery plan case.

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio

APPENDIX U

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED

[Filed May 11, 2004]

No. 244354 MPSC
LC No. 00-012725

MICHIGAN ENVIRONMENTAL COUNCIL and PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN,
Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION, WISCONSIN ELECTRIC POWER COMPANY, and INTERNATIONAL PAPER COMPANY,
Appellees.

No. 246744 MPSC
LC No. 00-012725

INTERNATIONAL PAPER COMPANY,
Appellant,

v)
)
MICHIGAN PUBLIC SERVICE)
COMMISSION and WISCONSIN)
ELECTRIC POWER COMPANY,)
Appellees.)
)

Before: Murray, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

In these consolidated cases appellants Michigan Environmental Council (MEC), Public Interest Research Group in Michigan (PIRGIM), and International Paper Company (IPC) appeal as of right orders entered by appellee Michigan Public Service Commission (PSC) setting tariff rates for appellee Wisconsin Electric Power Company (WEPCO). We affirm in each case.

I. Underlying Facts and Proceedings

WEPCO owns and operates a nuclear generating plant in Wisconsin that supplies electricity to residential and commercial customers in the western portion of Michigan's Upper Peninsula. IPC is WEPCO's largest retail customer in Michigan. Spent nuclear fuel (SNF) is stored at an on-site facility at WEPCO's plant. WEPCO entered into a standard contract with the Department of Energy (DOE), as required by the Nuclear Waste Policy Act of 1982 (NWPA), 42 USC 10101 *et seq*. Under the contract WEPCO pays a fee to the DOE for a federal SNF disposal program. This program was scheduled to

begin no later than January 31, 1998. Currently, the DOE estimates that the program will begin in 2010. WEPCO classifies the SNF fee as a nuclear fuel expense and includes the cost in its power supply cost recovery (PSCR) program.[1]

In late 2000 WEPCO filed a general rate case application[2] alleging a revenue deficiency and seeking an annual increase of $3.74 million in its tariff rates for its Upper Peninsula service area. WEPCO projected a 2000 test year for ratemaking purposes and included transmission assets in its base rate for which the annual increase was requested, notwithstanding the fact that on January 1, 2001 those assets were to be transferred to the American Transmission Company, LLC (ATC), a company formed to provide wholesale transmission services by

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[1] MCL 460.6j, added by 1982 PA 304 (Act 304), authorizes the PSC to include a PSCR clause in a utility's rate schedule. A PSCR clause allows a utility to charge customers for the anticipated costs associated with the supply of power. Each year a utility with a PSCR clause in its rate schedule must file a PSCR plan for the upcoming year and a five-year forecast of power supply requirements. MCL 460.6j(3) and (4). The PSC approves, disapproves, or modifies the proposed PSCR plan. MCL 460.6j. After the end of the year the PSC conducts a reconciliation proceeding in which it makes adjustments to take into account the true cost of supplying power. MCL 460.6j(12) and (13).

[2] A "general rate case" is defined as "a proceeding initiated by a utility in an application filed with the commission that alleges a revenue deficiency and requests an increase in the schedule of rates or charges based on the utility's total cost of providing service." MCL 460.6a(2)(b). IPC, MEC, and PIRGIM were granted leave to intervene in the proceedings.

consolidating the transmission assets of several electric utilities. Acting on a remand order from the PSC, WEPCO adjusted its 2000 test year by removing transmission assets and related cost components, and continued to seek $3.74 million in rate relief.

At evidentiary hearings the PSC Staff quantified the effect of the removal of the transmission assets from WEPCO's base rate at $1.36 million, and proposed that rather than removing that amount from the base rate, the amount be added to WEPCO's allowance for the cost of power supply and included in WEPCO's annual PSCR plan and reconciliation proceedings. WEPCO accepted the Staff's proposed adjustments on the ground that they had the same net effect as reducing rates by the cost of the transmission assets.

MEC and PIRGIM presented the testimony of a nuclear energy consultant who expressed concerns regarding the DOE's SNF disposal program, and contended that WEPCO had not sufficiently addressed those concerns. The witness asserted that given the possibility that the federal government would never implement a SNF disposal program, the PSC was authorized and obligated to review the reasonableness and prudence of WEPCO's actions in administering the contract with the DOE and to determine whether WEPCO was taking all appropriate steps to protect ratepayers. The witness recommended that the PSC adopt several remedies to ensure that WEPCO shared the financial risk of SNF disposal, including: filing more detailed reports regarding its monitoring of the problem, placing revenues collected for the payment of the SNF fee in an escrow account to fund an

alternative disposal program if the federal government failed to fulfill its obligations, modifying its nuclear decommissioning fund to provide for the disposal of SNF, and obtaining a performance bond or an insurance policy to ensure proper performance of SNF disposal. The witness did not identify as unreasonable or imprudent any specific action taken by WEPCO.

WEPCO presented a witness who testified that the utility had taken reasonable and prudent steps to manage the storage and disposal of SNF. The witness indicated that WEPCO decided to continue paying the SNF fee to the DOE as required by the Standard Contract because it had been advised that suspending the payments could result in a loss of plant licensure and the future ability to have the DOE dispose of SNF.

IPC attempted to present evidence that the 2000 test year as revised by WEPCO was not a valid basis for establishing rates, and that addressed developments outside the 2000 test year. The PSC disallowed the testimony, concluding that it was irrelevant.

The PSC authorized WEPCO to increase its annual electric base revenues by $3.18 million, and rejected MEC and PIRGIM's request that it impose various conditions on WEPCO's collection of revenues. The PSC concluded that WEPCO's decision to transfer its transmission assets to ATC was reasonable and prudent, and authorized WEPCO to recover ATC transmission charges through its PSCR clause. The PSC acknowledged that the issues surrounding the disposal of SNF were significant and that a solution would not be implemented in accordance with the

DOE's timetable, but found that implementation of the remedies proposed by MEC and PIRGIM was not necessary to correct any showing of unreasonable or imprudent action by WEPCO.

II. Analysis

The standard of review for PSC orders is narrow and well defined. Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Michigan Consolidated Gas Co v Public Service Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. *In re MCI Telecommunications Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). An order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc v Public Service Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966).

A reviewing court gives due deference to the PSC's administrative expertise, and is not to substitute its judgment for that of the PSC. *Attorney General v Public Service Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). However, a reviewing court may not abandon its responsibility to interpret statutory language and legislative intent. *Miller Bros v Public Service Comm*, 180 Mich App 227, 232; 446 NW2d 640

(1989). Statutory interpretation is a question of law subject to de novo review. We will defer to the construction placed on a statute by the agency charged with interpreting it, unless that interpretation is clearly erroneous. *In re Canales Complaint*, 247 Mich App 487, 496; 637 NW2d 236 (2001). Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Michigan*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

A. Issues Raised by MEC and PIRGIM in Docket No. 244354

First, MEC and PIRGIM argue that the PSC erred in concluding that consideration of their recommendations and proposed remedies was beyond or possibly beyond the scope of its jurisdiction in a general rate case. They note that the PSC is authorized to review proposed charges in both general rate cases and rate reconciliation cases, MCL 460.6a; MCL 460.6j, and assert that therefore, it is logical to conclude that the PSC has the authority to consider and impose lesser remedies to protect ratepayers.

We disagree. The PSC possesses only that authority granted to it by the Legislature. *Attorney General v Public Service Comm*, 231 Mich App 76, 78; 585 NW2d 310 (1998). The statutes that confer power on the PSC must be strictly construed. Authority must be granted by clear and unmistakable language. A doubtful power does not exist. Words and phrases in the PSC's enabling statutes must be read narrowly and in the context of the statutory scheme. *Consumers Power Co*

v Public Service Comm, 460 Mich 148, 155-159; 596 NW2d 126 (1999).

The PSC has the power to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities. MCL 460.6. The PSC did not conclude that in the context of a general rate case it lacked jurisdiction to implement the remedies proposed by MEC and PIRGIM. Rather, the PSC determined that implementation of the suggested remedies was not necessary to correct any unreasonable or imprudent action by WEPCO. WEPCO included costs related to SNF disposal and payment of the SNF fee in its base rate which it sought by application to increase. The PSC did not presume that SNF costs were subject to automatic recovery, but rather scrutinized WEPCO's rate increase request in contested case hearings. MEC and PIRGIM did not allege, and the PSC did not find, that WEPCO acted unreasonably or imprudently with respect to issues related to SNF disposal and payment of SNF fees to the DOE. No statute authorizes the PSC to take action such as that suggested by MEC and PIRGIM in either a general rate case or a PSCR proceeding absent a finding of unreasonable or imprudent action by a utility. The PSC correctly concluded that the lack of unreasonable or imprudent conduct by WEPCO made implementation of any remedy proposed by MEC and PIRGIM unnecessary. The PSC's statements reflect a correct interpretation and application of MCL 460.6a in cases in which no unreasonable or imprudent conduct is found. That interpretation and application is entitled to deference. *Canales*, *supra*. The PSC's

orders are not unlawful or unreasonable. MCL 462.26(8).

Next, MEC and PIRGIM argue that the PSC's finding that WEPCO acted reasonably and prudently with respect to SNF disposal costs is unexplained and not supported by the requisite evidence. They assert that the PSC ignored evidence that WEPCO failed to grasp the enormity of the potential problems with SNF disposal and abrogated its responsibility to balance the interests of ratepayers with those of the utility.

We disagree. WEPCO's witness testified that the utility acted reasonably and prudently with respect to SNF disposal costs. The witness presented by MEC and PIRGIM did not give contradictory testimony. The PSC acted in accordance with the authority granted to it, including the authority to consider a variety of factors when setting just and reasonable rates, *Detroit v Public Service Comm*, 308 Mich 706, 718; 14 NW2d 784 (1944), and properly concluded that in the absence of a finding of unreasonable or imprudent conduct on the part of WEPCO, implementation of remedies such as those proposed by MEC and PIRGIM was unnecessary. The PSC's orders are not unlawful or unreasonable. MCL 462.26(8).

Finally, we note that MEC and PIRGIM's argument that their proposed remedies are not preempted by federal law was not raised before or addressed by the PSC, and thus is not properly before us. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). The PSC did not rely on the doctrine of federal preemption as a basis for its decision.

B. Issues Raised by IPC in Docket No. 246744

First, IPC argues that the PSC unlawfully allowed WEPCO a rate of return[3] on transmission assets that WEPCO did not own, i.e., those transferred to ATC on January 1, 2001, and over which the PSC had no jurisdiction. IPC notes that if a utility takes a service from a third party, the cost incurred constitutes an operating expense. The utility has no investment in the assets used by the third party to provide the service; thus, the value of those assets cannot be included in the portion of the base rate upon which the utility is entitled to seek a rate of return.

We disagree. The PSC adopted the Staff's recommendation that WEPCO's cost of owning and operating the transmission assets, calculated to be $1.36 million, be recovered not by reducing WEPCO's base tariff rates by that amount but rather by adding that amount to the allowance of the cost of power supply included in the base rates. Thereafter, an amount equal to the revenues attributable to the transmission assets would be credited toward retail customer payment of PSCR costs. The net effect of the arrangement was to allow WEPCO to recover the cost of receiving transmission services from ATC, but not to earn a rate of return on the transmission assets it no

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[3] Rates are set based on the following formula: R = B(r) + O. In this formula, "R" represents the revenue the rate will generate, "B" represents the value of the assets upon which the utility seeks the rate of return, "r" represents the rate of return, and "O" represents the utility's operating expenses, which require revenue over and above the return sought on investments.

longer owned. We give great weight to the PSC's decisions regarding the structure of WEPCO's rates and the method by which WEPCO could recover the costs associated with obtaining transmission services from ATC. *Champion's Auto Ferry, Inc v Public Service Comm*, 231 Mich App 699, 708; 588 NW2d 153 (1998); *Attorney General v Public Service Comm*, 220 Mich App 561, 568; 560 NW2d 348 (1996). The PSC's orders are not unlawful or unreasonable. MCL 462.26(8).

Second, IPC argues that the PSC lacked authority to authorize WEPCO to recover the cost of obtaining transmission services from ATC in its PSCR proceedings. IPC asserts that the purchase of transmission services does not constitute a power transaction or the purchase of fuel, and thus is not a power supply cost recoverable in a PSCR proceeding.

We disagree. The PSC has broad authority to set just and reasonable rates and may, in the exercise of its discretion, determine what factors are relevant in a particular case. The PSC is not bound by any particular ratemaking methodology, and can make pragmatic adjustments in order to respond to particular circumstances in any given case. *Attorney General v Public Service Comm*, 189 Mich App 138, 147; 472 NW2d 53 (1991).

Power supply costs recoverable in PSCR proceedings include "booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, or fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility

incurred under reasonable and prudent policies and practices." MCL 460.6j(1)(a). Nothing in Act 304 in general or in MCL 460.6j in particular prohibits the recognition of transmission costs as PSCR costs. Power must be transmitted in order for it to be distributed to a utility's customers. This holds true whether the power is generated by the utility itself or purchased by the utility from a third-party provider. PSC witnesses testified that historically, transmission costs have been accounted for in PSCR proceedings. The PSC's decision to allow WEPCO to recover transmission costs as PSCR costs was within the PSC's broad ratemaking authority, *Attorney General*, *supra*, 79, was consistent with the language of Act 304 in general and of MCL 460.6j in particular, *Consumers Power Co*, *supra*, 157 n 8, and was supported by the requisite evidence. *Associated Truck Lines*, *supra*. We defer to the PSC's construction of a regulatory scheme it is empowered to administer. *Champion's Auto Ferry*, *supra*. The PSC's orders are not unlawful or unreasonable. MCL 462.26(8).

Third, IPC argues that the PSC erred in concluding that WEPCO's decision to transfer its transmission assets to ATC was reasonable and prudent and that WEPCO should be allowed to recover the resulting fees paid to ATC. IPC observes that no specific evidence supported WEPCO's assertion that the transfer would result in economic benefits to ratepayers, and notes that other evidence suggested that the rates charged by ATC would increase over the years.

We disagree. WEPCO's witness testified that the transfer was reasonable and prudent, and noted that ATC would make system-wide improvements above

and beyond those that would have been made had the transfer not taken place. These improvements would result in greater reliability and lower costs. IPC's witness stated that the transfer appeared to be imprudent, but pointed to no specific evidence on which he based this conclusion. The PSC was entitled to rely on the evidence provided by WEPCO's witness, notwithstanding the existence of contradictory evidence. *Great Lakes Steel v Public Service Comm*, 130 Mich App 470, 481-482; 344 NW2d 321 (1983). The PSC's orders are not unlawful or unreasonable. *In re MCI*, *supra*; *Associated Truck Lines*, *supra*; MCL 462.26(8).

Fourth, IPC argues that the PSC's orders unlawfully and unreasonably authorize rates that do not reflect known circumstances for the period in which the rates are to be in effect, and utilize an erroneous Single Business Tax (SBT) rate. IPC contends that by allowing WEPCO's cost of obtaining transmission services from ATC to be accounted for in WEPCO's PSCR proceedings, the PSC allowed the costs that assumed WEPCO's continued ownership of its transmission assets to remain in the base rate for WEPCO's PSCR clause. Furthermore, IPC asserts that the PSC's utilization of a constant SBT rate of 1.9% failed to account for the fact that the SBT is being phased out at the rate of 0.1% per fiscal year.

We disagree. By accounting for WEPCO's cost of obtaining transmission services from ATC in WEPCO's PSCR proceedings, the PSC ensured that WEPCO's rates would accurately reflect the true cost of ATC's services in future years. The PSC's decision to account for WEPCO's transmission costs in this manner was

an appropriate exercise of its discretion and ratemaking authority. *Attorney General, supra*, 147. Moreover, the PSC's adoption of a constant SBT rate of 1.9% was reasonable under the circumstances. The SBT rate declines in a given fiscal year only if the rainy day fund for the previous year exceeds $250 million. MCL 208.31(5). No evidence showed that the requisite conditions would exist to support a reduction in the SBT rate for fiscal year 2003 and beyond. The PSC's orders are not unlawful or unreasonable. MCL 462.26(8).

Fifth, IPC argues that the PSC unlawfully adopted a rate design that does not reflect the true cost of service for WEPCO's various classes of customers. IPC contends that the PSC's adoption of its Staff's recommended rate design increased the subsidies granted to residential customers, and placed a greater percentage of the total cost of service on industrial customers.

We disagree. WEPCO proposed rate increases of 19.1% for residential customers, 5.2% for general secondary customers, and 6.5% for general primary customers. The PSC adopted its Staff's proposed increases of 13.1% for residential customers, 7.3% for general secondary customers, and 7.5% for general primary customers, concluding that the Staff's rate design took into account the considerations necessary to set just and reasonable rates for WEPCO's various classes of customers, and to avoid imposing a harsh rate increase on residential customers in one stage. The PSC's finding that adoption of the Staff's proposed rate design would accomplish the goal of moving WEPCO's rates for its various classes of customers

closer to the actual cost of service was supported by testimony from the Staff's witness. The PSC was entitled to rely on this evidence, notwithstanding the fact that IPC presented evidence that recommended that all rates be based strictly on cost of service. *Great Lakes Steel, supra.* The PSC did not abuse its discretion in the exercise of its ratemaking authority, *Detroit Edison Co v Public Service Comm*, 221 Mich App 370, 374; 562 NW2d 224 (1997), and its decision to adopt the rate design recommended by the Staff was supported by the evidence. *Associated Truck Lines, supra.* The PSC's orders are not unlawful or unreasonable. MCL 462.26(8).

Finally, IPC argues that the PSC deprived it of due process by denying it access to data regarding WEPCO's actual booked expenses for the year 2001 and by excluding testimony regarding 2001 test data. IPC notes that its witness disputed the assertion that WEPCO's revised 2000 test year accurately reflected the impact of the transfer of the transmission assets to ATC, but was unable to quantify the flaws or present evidence to support his assertions without access to the requested data.

We disagree. The PSC's remand order afforded WEPCO the option of adjusting its 2000 test year to account for the effect of the transfer of the transmission assets or developing a new test year. Significantly, the order did not grant the other parties permission to challenge the choice made by WEPCO, and prohibited the parties from raising new issues on remand. IPC was entitled to, and did, assert on remand that WEPCO's adjusted 2000 test year data was flawed. However, evidence of the effect of the

transfer of WEPCO's transmission assets on other years, such as 2001, was irrelevant to the issue of whether WEPCO accurately accounted for the effect of the transfer in the 2000 test year. The PSC's interpretation of the scope of its remand order and the evidence permitted thereunder was reasonable and is entitled to deference. *In re MCI Telecommunications Corp Complaint*, 240 Mich App 292, 303; 612 NW2d 826 (2000). The PSC's orders are not unlawful or unreasonable. MCL 462.26(8).

Affirmed.

/s/ Christopher M. Murray

/s/ Janet T. Neff

/s/ Pat M. Donofrio

APPENDIX V

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

Case No. U-13771

[Filed March 26, 2003]

In the Matter of the Formal Complaint of the **MICHIGAN ENVIRONMENTAL COUNCIL, PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN** and **MICHIGAN CONSUMER FEDERATION**, for Commencement of a Generic Investigation and Contested Case, for Review and Audit of Books and Records, for Establishment of Separate Additional External Nuclear Plant Site Decommissioning Trusts, and for Adoption of Additional Ratemaking Remedies Relating to Spent Nuclear Fuel (SNF) Fees and Costs Collected in Rates by Nuclear Utilities Serving Michigan Including **CONSUMERS ENERGY COMPANY, THE DETROIT EDISON COMPANY, INDIANA MICHIGAN POWER COMPANY/AMERICAN ELECTRIC POWER, WISCONSIN ELECTRIC POWER COMPANY**, and **WISCONSIN PUBLIC SERVICE CORPORATION**.

FORMAL COMPLAINT FOR COMMENCEMENT OF A GENERIC INVESTIGATION AND CONTESTED CASE, FOR REVIEW AND AUDIT OF BOOKS AND RECORDS, FOR ESTABLISHMENT OF SEPARATE ADDITIONAL EXTERNAL NUCLEAR PLANT SITE DECOMMISSIONING TRUSTS, AND FOR ADOPTION OF ADDITIONAL RATEMAKING REMEDIES RELATING TO SPENT NUCLEAR FUEL (SNF) FEES AND COSTS COLLECTED IN RATES BY NUCLEAR UTILITIES SERVING MICHIGAN

March 26, 2003

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The Michigan Environmental Council ("MEC"), the Public Interest Research Group in Michigan ("PIRGIM"), and the Michigan Consumer Federation (MCF), by and through their attorneys, Clark Hill PLC, and pursuant to MCL 460.58, MCL 460.557, MCL 462.10(a), MCL 462.22, and such other statutes, rules, and other authority cited herein or which may be applicable, file this Formal Complaint seeking the commencement of a generic investigation and formal contested case proceeding before the Michigan Public Service Commission ("MPSC" or "Commission") to review all facts and issues concerning the costs of spent nuclear fuel (SNF) storage and disposal, including the cost of SNF fees collected and being collected from Michigan ratepayers, and to adopt a number of ratemaking remedies, as specifically requested herein, to protect Michigan's ratepayers and the public interest, with respect to nuclear utilities serving Michigan, including: Consumers Energy Company (CECo), The Detroit Edison Company (DECo), Indiana Michigan Power Company/American Electric Power (IM Power), Wisconsin Electric Power Company (WEPCo) and the Wisconsin Public Service Corporation (WPSCorp) (hereinafter "Respondent Utilities"). In support of this Formal Complaint, MEC, PIRGIM, and MCF assert that Respondent utilities' rates and charges, and their practices, actions, and omissions, with respect to SNF fee, storage, and disposal costs, and matters, are unjust, unreasonable, imprudent, and improper, and that the Commission's lack of regulatory action to remedy said matters is also unlawful and unreasonable, and further state as follows:

I. STATEMENT OF THE CASE

This case seeks invocation of the Commission's jurisdiction and authority to commence and continue an ongoing generic investigation and formal contested case concerning all costs and matters related to SNF storage and disposal, including SNF fee costs collected by nuclear utilities serving Michigan ratepayers, and to adopt several remedies to protect Michigan's ratepayers and public interests on a long-range basis.

This case has become necessary because: (1) respondent utilities' rates and charges are unjust, unreasonable, and improper because they shift all increasing, duplicative, and substantial SNF fee, storage, and disposal costs and financial risks to ratepayers, contrary to state and federal law; (2) Michigan's ratepayers and important public interests have been rendered legally insecure, due to the actions, practices, and omissions of respondent nuclear utilities, and (3) this Commission's failure or refusal thus far to review and address the compelling SNF cost issues is unlawful, unreasonable, and improper, justifying a renewed and vigorous formal review of SNF cost and rate issues by the Commission.

Complainants and their citizen members are directly harmed and prejudiced by the current unacceptable situation. Michigan ratepayers have paid and are paying hundreds of millions of dollars for SNF fees for a federal SNF disposal program which is in default and which may never dispose SNF, and for a host of increasing and duplicative costs for respondent utilities to store SNF for much longer periods than contemplated. Michigan ratepayers are also

shouldering the multi-billion dollar risk of disposing SNF when and if the utilities and the federal government permanently default in their SNF disposal duties and obligations. Compelling reasons also exist, derived from both long-term experience and recent events with the federal SNF disposal program, to conclude that there is an increasing and alarming risk that the federal government may **never** ultimately dispose of respondent utilities' SNF.

Complainants therefore seek Commission adoption of remedies to protect Michigan's ratepayers and compelling state and public interests, pursuant to the Commission's jurisdiction and authority granted under state law, as supported by federal law. All of the remedies sought herein, such as commencement of a generic investigation and contested case, enhanced rate reviews, establishment of separate external decommissioning trusts or escrows, adoption of standby trusts or additional surety methods, or alternatively, downward rate adjustments, are fully within the Commission's authority and mandated duties, and comprise remedies recognized by the U.S. Nuclear Regulatory Commission (NRC) as important and needed, and properly subject to the powers of state regulatory commissions. Adoption by the Commission of the remedies requested herein would also be consistent with the objectives, purposes, and provisions of the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 *et seq.* (NWPA).

Complainants' various remedies include the request that certain SNF fees that CECo has collected from ratepayers, totaling $137.6 million (including interest) through December 31, 2002, but has not paid to the

Nuclear Waste Fund (NWF), ("utility SNF fee debt"), be promptly transferred to a separate external decommissioning trust regulated by the MPSC, in the same manner that the Commission ordered several years ago for similar SNF fee funds held by IM Power. This remedy is particularly important given the serious weakening financial status of CECo and its parent company, CMS Energy.

II. THE PARTIES

A. Complainants

1. MEC is a statewide non-profit public interest and environmental organization consisting of 64 public health and environmental organizations, having over 200,000 members. Various of the individual member organizations of MEC, and their citizen members, purchase their electricity in whole or part from all of the respondent nuclear utilities. MEC's headquarters are located at 119 Pere Marquette Drive, Suite 2A, Lansing, Michigan 48912.

2. PIRGIM is a statewide non-profit consumer protection and environmental organization made up of approximately 10,000 members located within and throughout the state of Michigan. PIRGIM's members include citizens who purchase their electricity from respondent nuclear utilities. PIRGIM's headquarters are located at 122 South Main Street, Suite 370, Ann Arbor, Michigan 48104.

3. MCF is a statewide non-profit consumer advocacy organization made up of approximately 10,000 individual dues-paying members throughout

the State of Michigan. MCF's purposes include the presentation of the consumer and economic interests of its members in proceedings before regulatory agencies, which includes matters involving the rates and charges its members pay for electricity. MCF has a history of representing its members and protecting them from economic harm in proceedings before the Commission. As a member of the Residential Ratepayers Consortium (RRC), MCF has participated before the Commission in numerous cases involving the review and determination of utility costs and rates. MCF's members include citizens who purchase their electricity from respondent utilities. MCF's headquarters are located at 4990 Northwind Drive, Suite 225, East Lansing, Michigan 48823.

4. MEC, PIRGIM and MCF, and their citizen members, include thousands of citizens who obtain their electric energy from respondent utilities, and thus are directly affected by and interested in the rates, terms and conditions, and policies governing the provision of electric energy to its members and the general public. MEC, PIRGIM and MCF, and their citizen members, also have a vital interest in ensuring that utility rates are just and reasonable and that electricity is provided in an efficient manner with minimization of waste to our State's economic and environmental resources. MEC, PIRGIM and MCF, and their citizen members, need to be protected from economic harm caused by unreasonable and imprudent practices, policies, actions, and omissions of respondent nuclear utilities, and from increasing, duplicative, and unreasonable and imprudent rates and charges, relating to SNF fees, and storage and disposal costs.

5. MEC, PIRGIM and MCF are appropriate "interested persons" or parties with standing to represent the interests of their members and member organizations and to file this Formal Complaint pursuant to numerous statutes governing the Commission's powers and procedures, as cited in paragraphs 12-20, *infra*, the *Michigan Administrative Procedures Act*, MCL 24.201 *et seq*., and pursuant to Rules 101, 501, and 505, of the *Commission's Rules of Practice and Procedure, R 460.17101 et al.*

6. MEC, PIRGIM, and MCF, have intervened in and participated in numerous recent MPSC cases involving several utilities, and have raised issues and recommended remedies to protect Michigan ratepayers and the public interest relative to various costs being charged to Michigan ratepayers. MEC and PIRGIM's case participation has included intervention in separate rate complaint cases commenced by the Association of Businesses Advocating Tariff Equity (ABATE) regarding DECo's rates in U-11495 and CECo's rates in U-11560; DECo's 2000 Power Supply Cost Recovery ("PSCR") plan case, U-12121; the 2001 PSCR plan case of Northern States Power Company-Wisconsin ("NSP-W") in U-12614, the 2001 PSCR plan cases of WPSCorp in U-12613 and WEPCo in U-12615; and the separate (and later consolidated) electric restructuring cases of certain Michigan utilities commenced by the MPSC's order in U-12464, which included: WEPCo, U-12649; WPSCorp, U-12650; NSP-W, U-12651; and I&M, U-12652. MEC and PIRGIM were also granted intervenor status in CECo's and DECo's securitization cases in MPSC Case No. U-12505, U-12478, and U-13715. MEC, PIRGIM, and MCF have also jointly intervened in WPSCorp's rate

case, U-13688. As noted, MCF as a member of RCC has also intervened in countless MPSC utility cases over a span of many years.

B. Respondent Utilities

7. Respondent CECo is a Michigan utility with headquarters located at 212 West Michigan Avenue, Jackson, Michigan 49201. CECo is regulated by the MPSC, and is a subsidiary of CMS Energy. CECo is engaged, among other activities, in the business of supplying electrical service and energy, including nuclear energy, to its customers in the State of Michigan, subject to MPSC regulation. CECo owns and operates the Palisades Nuclear Plant located in South Haven, Michigan. In addition to CECo, a different company, the Nuclear Management Company (NMC), operates the Palisades Nuclear Plant pursuant to an operating services agreement with CECo. The operating license of Palisades has also been transferred to NMC. CECo stores SNF in a storage pool within its Palisades plant. CECo also is storing SNF in dry-cask storage facilities at its Palisade plant site, which have been developed and expanded since SNF pool storage was exhausted at the plant. CECo also operated the Big Rock Point Nuclear Plant near Charlevoix, Michigan, which closed operations in 1997. CECo has constructed and is operating a SNF dry-cask storage facility at that site to indefinitely store SNF while the plant is being dismantled. CECo is charging in base rates for its SNF storage costs, and for the expansion of facilities to store SNF, among other costs. CECo is also charging in customer rates a federal fee of 1 mil/kWh on nuclear energy generated and sold to Michigan customers (the "SNF fee") which is paid or is

payable to the NWF pursuant to the NWPA. CECo has collected a net total of $213.8 million (including interest credits) from its Michigan customers for the federal SNF fee through December 31, 2002 (See Complaint Exhibit A, p 1, hereto). Of this amount, $137.7 million (including interest) of utility SNF fee debt has been collected by CECo from ratepayers through December 31, 2002, for nuclear energy generated and sold before April 7, 1983, but has not been paid by CECo to the NWF (Complaint Exhibit A, p 2). CECo continues to collect in rates several million dollars for its SNF fees on an annual basis.

8. Respondent DECo is a public utility with headquarters located at 2000 Second Avenue, Detroit, Michigan 48226. DECo is a subsidiary of DTE Energy, its parent company. DECo is engaged, among other activities, in the business of supplying electrical service and energy, including nuclear energy, to its customers in the state of Michigan, subject to MPSC regulation. DECo owns and operates the Enrico Fermi II Nuclear Plant, located near Monroe, Michigan. DECo is presently generating and storing SNF in pool facilities at the Fermi II plant. DECo is charging in base rates for its SNF storage costs, and for the development and planned expansion of dry-cask facilities to store SNF, among other costs. DECo is also charging for the SNF fee in customer rates for nuclear energy generated and sold in Michigan. DECo has collected a total of $88.5 million (including interest credits) from its Michigan customers for the federal SNF fee through December 31, 2002, (Complaint Exhibit A, p 3), and continues to collect several million dollars for its SNF fees on an annual basis.

9. Respondent IM Power is regulated by the Commission with respect to its service territory located in southwestern Michigan. IM Power has its headquarters located at One Summit Plaza, Fort Wayne, Indiana 46801, and is a wholly owned subsidiary or division of America Electric Power Company (AEP). IM Power owns and operates the Donald C. Cook Nuclear Plant located in Bridgeman, Michigan, which generates nuclear energy in part for sale to Michigan customers. At present, IM Power is storing SNF in pool facilities at its Michigan plant site and has incurred additional expenses to expand its SNF pool storage at the plant and to plan for the development of dry-cask SNF storage facilities, which costs are charged in customer rates. IM Power has also included in customer rates for the SNF fee for all nuclear energy generated and sold in Michigan from the Cook plant since its inception. Through December 31, 2002, IM Power has collected a total of $405.4 million (including interest credits) in rates for the federal SNF fee, of which approximately $223.7 million (plus interest) relates to utility SNF fee debt for the federal SNF fee for pre-April 7, 1983 nuclear generation which IM Power has **not** paid to the federal government (Complaint Exhibit A, p 4-5). Of these amounts, rate collections have been allocated to the various states receiving nuclear energy from the Cook plant, with Michigan ratepayers paying their percentage allocation. IM Power continues to collect in rates several million dollars for its SNF fees on an annual basis.

10. WEPCo provides electric energy and service, including nuclear energy, to its service territory located in portions of Michigan's Upper Peninsula, in

addition to portions of Wisconsin. WEPCo's headquarters office is located at 231 W. Michigan St., Milwaukee, Wisconsin 53290-001. WEPCo's rates and services are regulated by the MPSC with respect to its Michigan service territory. WEPCo owns and operates two nuclear generating units at its Point Beach Nuclear Plant in Two Rivers, Wisconsin. In addition, a different company, the NMC, operates the two Point Beach Nuclear units pursuant to an operating services agreement with WEPCo. The operating license of the two Point Beach units has also been transferred to the NMC. WEPCo collects in its customer rates for the SNF fee and storage costs, on an allocated basis in both its Michigan and Wisconsin territories. WEPCo includes in rates the cost of storing SNF in its plant pool facilities, and for developing and expanding dry-cask SNF storage facilities at its plant site. WEPCo has collected a total of $123.6 million (including interest) in rates for the SNF fee through December 31, 2002, (Exhibit A, p 6), of which an allocated portion of approximately 2.5 to 9.8 percent relates to collections from Michigan customers. WEPCo continues to collect in rates several million dollars in SNF fees on an annual basis.

11. WPSCorp has its principal office at 700 North Adams Street, P.O. Box 19001, Green Bay, Wisconsin 54307, and has a Michigan office located at 1717 Tenth Avenue, Menominee, Michigan 48958. WPSCorp provides electric energy and service, including nuclear energy, to its service territory located in portions of Michigan's Upper Peninsula in addition to portions of Wisconsin. The MPSC regulates WPSCorp's rates and services in its Michigan service territory. WPSCorp has owned 41.2 percent of the

Kewaunee Nuclear Plant located on the shores of Lake Michigan until the fall of 2001, after which its ownership increased to approximately 59 percent. WPSCorp also has entered into an operating services agreement with the NMC, which operates the Kewanee Plant. The operating license for the plant has been transferred to the NMC. WPSCorp collects in its customer rates on an allocated basis in both its Michigan and Wisconsin territories, for the SNF fee in addition to other costs associated with the generation of nuclear energy and the storage of SNF. WPSCorp includes in rates the cost of storing SNF in its pool facilities, and also the costs to develop and expand SNF dry-cask storage facilities at its plant site. WPSCorp has collected a total of $67.3 million (including interest) for the SNF fee through December 31, 2002, (Complaint Exhibit A, p 7), of which an allocated portion of approximately 2 percent has been charged to Michigan ratepayers. WPSCorp continues to collect in rates several million dollars in SNF fees on an annual basis.

III. MPSC JURISDICTION

A. State Law

12. The MPSC has inherited all of the jurisdiction, duties, and authority previously possessed by its predecessor commissions, the Public Utilities Commission and the Michigan Railroad Commission. *Union Carbide Corporation vs. Public Service Commission*, 431 Mich 118, 150, 155-156 (1988); Section 4 of the Public Service Commission Act, MCL 460.4; Section 4 of the Public Utilities Commission Act, MCL 460.54.

13. The Commission has broad ratemaking authority over respondent utilities pursuant to various "enabling acts" applicable to the Commission, including Section 6 and 6a of the Public Service Commission Act, MCL 460.6 and MCL 460.6a, as amended by 1982 PA 304, MCL 460.6 and 6a *et seq.* (Act 304), and 2000 PA 141, Section 10-10cc, MCL 460.10 *et seq.* (Act 141), Section 4 *et seq.* of the Public Utilities Commission Act, MCL 460.54 et seq., Section 2 *et seq.* of the Railroad Act, MCL 462.2 *et seq.*, the Electric Transmission of Electricity Act, Section 1 *et seq.*, MCL 460.551 *et seq.*, the Electric Transmission Line Certification Act, Section 1 *et seq.*, MCL 460.561 *et seq.*, and related statutes. The Commission is also subject to the requirements of Michigan's Administrative Procedures Act ("MAPA"), MCL 24.201 *et seq.*, and the Commission's own *Rules of Practice and Procedure Before the Commission*, 1992 AACS R 460.17101 *et seq.* ("*Commission's Rules*").

14. Once the Commission's jurisdiction is invoked pursuant to the above enabling acts, the Commission may interchangeably exercise its statutory jurisdiction and authority pursuant to all of the above statutes and rules, whether a case is commenced by an application of the utility, on the Commission's own motion, or by complaint. *Attorney General v MPSC*, 189 Mich App 138, 147-148 (1991). The Commission can thus undertake a full review of SNF cost issues and remedies in ongoing base rate, decommissioning, and Act 304 rate factor cases, and also pursuant to a contested case commenced by the filing of a formal complaint.

15. The Commission under its various statutes and constitutional due process standards has the paramount duty and authority to set and maintain "just and reasonable" utility rates. *Attorney General v PSC*, 189 Mich App 138, 146 (1991); *Northern Michigan Water Company v Public Service Commission*, 381 Mich 340, 351 (1968); Sections 4(a) and (b), 6(a), 10(g), 22 and 32 of the Railroad Act, 1909 PA 300, MCL 462.4(a) *et seq.*; Section 8 of the Public Utilities Commission Act, 1919 PA 410; MCL 460.58 *et seq.*, Sections 6 and 6a of the Public Service Commission Act 1939 PA 3, MCL 460.6 *et seq.*, and Section 7 of the Electric Transmission Act, 1909 PA 106, MCL 460.557 *et seq.* This Commission duty and authority is applicable to base rates and decommissioning rates, and also annual rate surcharges or credits for fuel and purchased power costs regulated under Act 304, including Section 6a, MCL 460.6a *et seq.* ("full and complete hearing on the cost of fuel or purchased gas); Sections 6j(1)(a), 6j(3), 6j(6), 6j(12), 6j(13)(g), 6j(14), 6j(15) MCL 460.6j(1)(a) *et seq.* (review of the "reasonableness and prudence" of a utility's plans, actions, forecasts, costs, etc.); Section 6j(1)(a) (review of disposal and reprocessing costs of fuel burned by the utility for electric generation); Section 6j(3) (evaluation of the reasonableness and prudence of utility decisions to provide power supply. . . and an explanation of the actions taken by the utility to minimize the cost of fuel to the utility."); Section 6j(4) (review of all relevant major contracts and power supply arrangements entered into or contemplated by the utility, "and such other information as the commission may require."); Section 6j(13)(g) and (j) (Commission in a PSCR reconciliation shall "disallow additional costs resulting from

unreasonably or imprudently renegotiated fuel contracts" and "disallow increases in charges for nuclear fuel disposal unless the utility has received the prior approval of the commission."); Section 6l(1) and 6m(12) (legislative policy to protect energy utility customers, and to protect the environment).

16. The Commission also has jurisdiction and authority to investigate rate and service issues, and actions, practices, or omissions of utilities, and to commence proceedings to protect ratepayers, pursuant to the filing of a formal complaint. Under Section 8 of the Public Utilities Commission Act, MCL 460.58, the MPSC is granted jurisdiction and authority to fully investigate, hold hearings, and undertake corrective action based upon a complaint filed by a consumer or other entity representing ratepayer interests. Section 8 states in pertinent part:

> Upon complaint in writing that any rate, classification, regulation or practice charged, made or observed by any public utility is unjust, inaccurate, or improper, to the prejudice of the complainant, the commission shall proceed to investigate the matter.....Upon the completion of any such hearing, the commission shall have authority to make an order or decree dismissing the complaint or directing that the rate, charge, practice or other matter complained of, shall be removed, modified or altered, as the commission deems just, equitable and in accordance with the rights of the parties concerned. . . .

Section 8 also provides the Commission with the authority to hold hearings, to subpoena witnesses, and

require the production of books and records, for purposes of investigating and ruling upon the subject matter of the complaint. The Commission is also empowered to investigate, hold hearings, and rule upon a complaint under Section 7 of the Transmission of Electricity Act, MCL 460.557, which states in part:

> The commission shall investigate each complaint against an electric utility submitted in writing by a consumer or a city, village, or township concerning the price of the electricity sold and delivered, the service rendered, or any other matter of complaint....After investigation and hearing, the commission may by order fix the price of electricity to be charged by the electric utility within lawful limits....The commission may establish by order rules and conditions of service that are just and reasonable....The rates of an electric utility shall be just and reasonable...

Section 7 also provides the Commission broad powers to investigate and hold hearings regarding the subject of the complaint, and to inspect the books and records of a utility and to inquire into the matters relating to the complaint. The Commissions powers to investigate, hold hearings, and to issue remedial orders regarding rates and other matters is further supported by Sections 4 and 6 of the Public Service Commission Act, MCL 460.4 and 460.6, and Sections 10(g) and 22 of the Railroad Act, MCL 462.10(g) and 462.22. Section 22 states in part:

> Upon complaint in writing of any person, firm or corporation or association, or of any

mercantile, agricultural or manufacturing society, or of any body politic or municipal organization, that any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation or practice whatsoever affecting the transportation of persons or property or any service in connection therewith, is in any respect unreasonable or unjustly discriminatory, or that any service is inadequate, the commission shall notify the common carrier...the commission may proceed to investigate the same....If, upon such investigation, the rate or rates, joint rate or rates, fares, charges or classifications, regulation, practice or service complained of shall be found to be unreasonable, inadequate or unjustly discriminatory, the commission shall have power to and it shall determine and by order fix and order substituted therefore, such rate or rates, joint rate or rates, fares and charges, as is or are just and reasonable, and which shall be the maximum to be charged in the future, and such classifications, regulation, practice or service as is or are just, reasonable and adequate, and which shall be imposed and followed or service rendered in future in lieu of that found to be unreasonable, inadequate or unjustly discriminatory, and in either case the commission shall make an order that the common carrier cease and desist from such violation, and shall conform to the regulation and practice so prescribed.....

> ...No complaint shall of necessity at any time be dismissed because of the absence of direct damage to the complainant;
>
> Whenever the commission shall believe that any rate or rates or charge or charges may be unreasonable or unjustly discriminatory, or that any service is inadequate, and that any investigation relating thereto should be made, it may, upon its own motion, investigate the same....the commission may proceed to investigate such rate or charge in the same manner and make like orders in respect thereto as if such investigation had been made upon complaint; . . . The commission may, after hearing on a complaint, establish . . . rates as the maximum to be charged and the terms and conditions under which such through routes . . . shall be operated....

17. The Commission Rules, R460.17101 et seq., including Rules 501 – *et seq.*, R460.17501 *et seq.*, also provide for the filing of formal complaints with the Commission. Rule 501 states:

> A complaint shall be limited to matters involving alleged unjust, inaccurate, or improper rates or charges or unlawful or unreasonable acts, practices, or omissions of a utility or motor carrier, including a violation of any commission rule, regulation, or order, including a tariff filed or published by a utility or motor carrier, or a violation of a statute administered or enforced by the commission. A complaint may be either formal or informal and

may be made by a person having an interest in the subject matter of the complaint or may be made by the commission on its own motion or by the staff, subject to applicable statutory standards.

18. The Commission also possesses broad jurisdiction and authority to regulate the books, records and accounting of utilities, to require the filing of reports, the production of documents, and to undertake investigations as to utility costs and rate matters, and to require utilities to maintain and produce for review information, data, and contracts as needed by the Commission to properly regulate and perform its duties, and to establish rules and regulations governing utilities and the Commission's regulation thereof. (Sections 2, 28, and 29 of the Railroad Act, MCL 462.2 *et seq.* Sections 3, 4, 5, 6, 7, and 8 of the Public Utilities Commission Act, MCL 460.53 *et seq.*, Sections 6, 6a, and 6j *et seq.*, of the Public Service Commission Act, MCL 460.6 *et seq.*, and Sections 6 and 7, of the Electric Transmission Act, MCL 460.556 *et seq.*). The Commission is empowered with respect to a rate, service, or other investigation to make an audit and analysis of the books and records of a utility. Section 6, Public Utilities Commission Act, MCL 460.556, Section 28, Railroad Act, MCL 462.28. The Commission also has established a Uniform System of Accounts for Major and Nonmajor Electric Utilities (460.9001 and R 460.9019), which governs the manner in which utilities are to keep their books for regulatory purposes. Rate and other Commission cases commenced by utility application, formal complaint, or on the Commission's own motion are also subject to formal contested case procedures, as set forth in the

enabling acts and also MAPA, supra. The Commission under Section 6 and 6a of the Public Service Commission Act, MCL 460.6 and 6a, as amended by 1982 PA 304 ("Act 304"), MCL 460.6j *et seq.*, has the power to require access to and to review all relevant information, plans and contracts and to examine the reasonableness and prudence of a utility's practices, plans and activities in generating or acquiring energy. The *Commission's Rules* governing contested cases and other matters, also incorporate the procedures of the Michigan Court Rules concerning the formal case discovery process, including the issuance of subpoenas, interrogatories, the taking of depositions, and numerous other matters, to provide the Commission and interested parties with the ability to obtain and review information needed for regulatory purposes. The Michigan courts have affirmed the Commission's widespread authority to undertake discovery in contested cases, and to obtain all necessary information to regulate the rates and books of all utilities. *Midland Cogeneration Venture Limited Partnership and Consumers Power Company v Public Service Commission*, 199 Mich App 286 (1993). These procedures give the Commission, and parties participating in contested rate and PSCR proceedings, enhanced powers to investigate and to require the production of information concerning claimed costs and requested rates.

19. The Commission pursuant to its enabling acts also has jurisdiction and authority to establish and regulate decommissioning trust funds to provide for the complete decommissioning of nuclear plants in Michigan. The MPSC has affirmatively found that it possesses said authority, and has regulated nuclear

decommissioning costs, rate charges, and trusts, commencing with its orders in MPSC Case No. U-6150, dated August 26, 1986. This same authority exists to empower the Commission to provide for and regulate decommissioning trusts for SNF fee collections, and SNF sites and facilities (e.g., Commission order in U-11237, dated November 26, 1996).

20. The Commission has jurisdiction and authority to issue declaratory rulings regarding its jurisdiction and authority, and regulatory matters, pursuant to Sections 33, 63, and 64 of the Michigan Administrative Procedures Act, MCL 24.233 et seq., and Rule 701 of the Commission's Rules, 1992 AACS R 460.17701.

B. Federal Law

21. The Commission's exercise of its broad regulatory powers to effect the reviews and remedies requested in this Complaint would constitute the proper exercise of state jurisdiction and authority over Michigan utilities and the retail sale of electricity in Michigan, in a manner fully consistent with and recognized by federal law. Section 201(b) of Federal Power Act, (FPA), 16 USC § 824(b); *Pacific Gas & Electric v Energy Resources Commission*, 461 US 190 (1983). The power of state regulatory commissions to regulate SNF cost and rate impacts relative to nuclear utilities subject to their jurisdiction is also fully consistent with the purposes and objectives of Congress as stated in Section 111 of the NWPA:

> Sec. 111. (a) FINDINGS. - The Congress finds that –

(1) radioactive waste creates potential risks and requires safe and environmentally acceptable methods of disposal;

(2) a national problem has been created by the accumulation of (A) spent nuclear fuel from nuclear reactors; and (B) radioactive waste from (i) reprocessing of spent nuclear fuel; (ii) activities related to medical research, diagnosis, and treatment; and (iii) other sources;

(3) Federal efforts during the past 30 years to devise a permanent solution to the problems of civilian radioactive waste disposal have not been adequate;

(4) while the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and such spent nuclear fuel as may be disposed of in order to protect the public health and safety and the environment, the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel;

(5) the generators and owners of high-level radioactive waste and spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of such waste and spent fuel until such waste and spent fuel is accepted by the Secretary of Energy in accordance with the provisions of this Act;

(6) State and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel; and

(7) high-level radioactive waste and spent nuclear fuel have become major subjects of public concern, and appropriate precautions must be taken to ensure that such waste and spent fuel do not adversely affect the public health and safety and environment for this or future generations.

(b) PURPOSES – The purposes of this subtitle are –

(1) to establish a schedule for the siting, construction and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and such spent nuclear fuel as may be disposed of in a repository;

(2) to establish the Federal responsibility, and a definite Federal policy, for the disposal of such waste and spent fuel;

(3) to define the relationship between the Federal Government and the State governments with respect to the disposal of such waste and spent fuel; and

(4) to establish a Nuclear Waste Fund, composed of payments made by the generators and owners of such waste and spent fuel, that will ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel.

[42 U.S.C. 10131]

The NWPA thus establishes the national policy that the generators and owners of SNF have the

responsibility to pay the costs of SNF interim storage and disposal, and to pay for the cost of SNF fees to the NWF. The NWPA says nothing about placing or shifting these costs to ratepayers, or limiting the ratemaking powers of state regulatory commissions in any fashion. The Commission thus may assign these cost burdens and financial risks upon respondent utilities as the generators and owners of SNF, or at the very least may require respondents to share in these costs and financial risks. Commission action to adopt the rate reviews and remedies outlined in this complaint would thus further all of the objectives and purposes of Congress outlined in the NWPA.

22. All of the Complainants' requests for protection of ratepayers with respect to the collection of SNF fees and costs, and for additional assurances for the full decommissioning of nuclear plant sites, including SNF storage sites, are consistent with and in furtherance of regulations of the NRC. State jurisdiction and authority over regulation of costs, rate collections, and trust oversight, related to the decommissioning of nuclear plants, has long been recognized under NRC regulations, including 10 CFR § 50.75 and 10 CFR 72.30. This remains true under recent amendments of these regulations (Rules and Regulations, Nuclear Regulatory Commission, 10 CFR Parts 50 and 72, RIN 3150-AG52, Decommissioning Trust Provisions, 67 FR 78332 et seq, December 24, 2002). The NRC's 2002 rulemaking makes clear that the NRC authorizes and recognizes state regulatory requirements to establish additional assurances and funding mechanisms to provide for ultimate SNF disposal, 67 FR 78339-78340; 67 FR 78342-78344. Commission action to adopt the rate reviews and other

remedies outlined in this complaint would thus further all of the objectives and purposes of Congress and its regulatory agency, as stated in NRC regulations.

IV. GENERAL ALLEGATIONS REGARDING RISK OF PERMANENT DEFAULT OF THE FEDERAL SNF DISPOSAL PROGRAM.

23. Based upon the long history of federal failures and delays in disposing SNF, a significant risk exists that the federal government may permanently default in its obligation to dispose SNF.

24. The national need for disposal of high-level nuclear waste (HLNW) began with the development of nuclear weapons in World War II. Shortly after World War II, the federal government also assumed the obligation to dispose of SNF as part of its program to authorize and encourage the civilian use of nuclear power. After many failed promises, and decades of delay and inaction by the federal government relative to SNF disposal, pressure mounted in Congress to adopt legislation to carry out the federal obligation on a certain and timely basis. This resulted in the adoption by Congress of the NWPA formally establishing the federal SNF disposal program. The NWPA was carefully crafted to provide mechanisms to overcome the reasons for past federal failures at SNF disposal. These measures included the establishment of the federal responsibility for SNF disposal, pursuant to a defined federal policy and program, with established deadlines, and a guaranteed source of funding to be paid by the generators and owners of SNF. The NWPA thus specifically provides that the entities owning and operating nuclear power plants, as

the generators and owners of SNF, must pay the costs for disposing of their SNF. 42 USC § 10131(a)(5). Section 302(a) also required the U.S. Department of Energy (DOE) and nuclear utilities to enter into a Standard Contract to further enforce the mutual obligations established by the NWPA. The Standard Contract was promulgated in 1983 through the rulemaking process ("Standard Contract for Disposal of Nuclear Fuel and/or High-Level Radioactive Waste", 10 CFR Part 961, 48 Fed Register 16590-16608, April 18, 1983), and was executed by DOE and each utility that owned and operated nuclear power plants. The Standard Contract, 10 CFR § 961.11, incorporated the reciprocal obligation in NWPA Section 302(a)(5)(B), 42 USC 10222(a)(5)(B), of payment of fees in return for DOE beginning to dispose SNF no later than January 31, 1998, as follows:

> . . . Contracts entered into under this section shall provide that -- . .
>
> . . .
>
> (B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subtitle.

Under Section 302 and the Standard Contracts, the utility contract holders must pay the NWF an on-going fee in the amount of one mil per kilowatt-hour of nuclear energy generated and sold. 42 USC § 10222(a)(2); 10 CFR § 961.11 Art. VIII. In addition, each utility that owned and operated a nuclear power plant as of April 7, 1983, was required to pay a one-time fee for SNF used to generate electricity prior to

that date, subject to an exception that granted utilities the option to hold the pre-April 1983 fees, and to accrue interest on said funds, for ultimate payment at the time the federal government started taking delivery of that utility's SNF. 10 CFR § 961.11 Art. VIII.

25. The federal government's performance under the NWPA and the Standard Contract has steadily eroded over time, as follows: (1) during the 1980's, the DOE repeatedly stated its firm commitment to carry out its unconditional obligation under the NWPA and the Standard Contract to commence acceptance of SNF for disposal by January 31, 1998; (2) by the late 1980's, when DOE had failed to make adequate progress, it changed position from a firm commitment to a period of inaction; and (3) commencing in late 1993 and thereafter, DOE repudiated its unconditional obligation, culminating in DOE's default of the January 31, 1998, deadline. DOE's repudiation of its duties under the NWPA was formalized in its April 28, 1995 *Final Interpretation of Nuclear Waste Acceptance Issues*, 60 Fed Reg 21, 793 (1995). Among other findings, the DOE concluded that it did not have an unconditional statutory or contractual obligation to accept high-level waste and SNF beginning January 31, 1998, in the absence of a repository or interim storage facility constructed under the NWPA. Moreover, the *Final Interpretation* held that, even if it had such an unconditional obligation, the Delays Clause of the Standard Contract would provide an administrative remedy for DOE's failure to satisfy its obligation. Upon judicial review of the DOE's *Final Interpretation* in separate suits brought by numerous utilities, states, and state commissions, the United

States Court of Appeals in *Indiana Michigan Power Co v Department of Energy*, 88 F.3d 1272, 1277 (DC Cir. 1996) reversed and vacated DOE's *Final Interpretation*, and remanded the matter for further proceedings, based upon its holding that the NWPA "creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998."

26. Despite the Court's ruling in *Indiana Michigan*, DOE thereafter continued to proceed upon the erroneous premise that it had no reciprocal duty to perform SNF disposal in exchange for SNF fee payments, and that it could excuse its own delays and shift all resulting costs to utilities and ratepayers despite its lack of performance. As part of this approach, DOE undertook no steps to comply with the court's decision and remand in *Indiana Michigan*, holding to its previous position that it had no duty to act absent the existence of a permanent repository. Numerous utilities, states, and state commissions, thereupon commenced separate joint actions in the United States Court of Appeals seeking a writ of mandamus against DOE, which resulted in the court's decision and partial mandamus order in *Northern States Power Company v United States Department of Energy*, 128 F.3d 754 (DC Cir. 1997). The court adhered to its ruling in *Indiana Michigan*, but did not grant a broad mandamus on the basis of a "potentially adequate contractual remedy." The court, however, did issue a partial mandamus to preclude DOE from excusing its own delay on grounds that it had not yet prepared a permanent repository or interim storage facility. In effect, the court invited the utilities, the signatories to the Standard Contract with DOE, to

pursue damage claims against DOE in the United States Court of Federal Claims, and barred DOE from using its "Delays Clause" defense to excuse its own delays. As of this date, over a score of nuclear utilities have filed damage suits in the Court of Claims seeking, on a combined basis, billions of dollars for reimbursement of increased costs resulting from DOE's default and delay.

27. On July 19, 2000, DOE entered into an amendment to the Standard Contract with PECo Energy Company (now Exelon Generation Company). In that amendment, DOE agreed to settle Exelon's claims arising from DOE's breach of its obligation to remove SNF from Exelon's Peach Bottom plant in exchange for credits against Exelon's obligation to pay SNF fees into the NWF. In essence, the contract amendment reduced or eliminated Exelon's SNF fees to defray the additional SNF storage costs that Exelon would incur as a result of DOE's failure to commence SNF disposal in 1998, and in exchange for Exelon's agreement not to file a damage action against DOE due to its default of its SNF disposal duties. In a court challenge of this contract amendment by other utilities, Exelon acknowledged that DOE awarded Exelon at least $31.8 million in such credits, which would reach $80 million over the next 10 years. DOE also announced that it planned to use the Exelon-type contract amendment as a model to extend to other nuclear utilities. In undertaking this action, DOE again demonstrated its propensity to devise strategies to excuse its own delays in meeting the requirements of the NWPA and Standard Contract, and to accommodate further delay, at the expense of the NWF and other utilities and ratepayers.

28. On November 22, 2000, a number of nuclear utilities filed a petition for review in the United States Court of Appeals (11th Circuit), challenging DOE's action in entering into the Exelon contract amendment. On September 24, 2002, the United State Court of Appeals issued its decision in *Alabama Power Company, et al. vs United Department of Energy, et al*, 307 F.3d 1300 (11th Cir. 2002), finding that the settlement and contract amendment were unlawful, and vacating same.

29. Since 1995, the DOE has maintained 2010 as a target date for opening the repository to begin acceptance of SNF for disposal – 12 years beyond the date mandated by the NWPA, as upheld by the Courts. DOE's target date is also many years later than dates the federal government promised in the 1960's and 1970's for beginning SNF disposal. It is also over a half century after the U.S. began producing high level nuclear waste thus originating the need for a repository.

30. DOE has taken some recent actions toward eventual establishment of a permanent SNF repository. On February 14, 2002, DOE Secretary Spencer Abraham formally recommended Yucca Mountain in Nevada as a permanent repository to receive SNF. On February 15, 2002, President Bush also approved Yucca Mountain as the site for the nation's first repository. On April 8, 2002, the state of Nevada issued its "Notice of Disapproval" of the Yucca Mountain site. On May 8, 2002, and July 9, 2002, respectively, the U.S. House of Representatives and U.S. Senate voted to override Nevada's disapproval.

These actions were undertaken pursuant to procedures established in the NWPA.

31. Since the Congressional vote, however, the DOE has committed yet another statutory violation. Contrary to the mandate of Section 114(b) of the NWPA, 42 U.S.C. § 10134(b), the DOE Secretary has failed to submit to the NRC a license application to seek a construction authorization for the repository within 90 days after the Yucca Mountain site designation became effective. Instead, DOE has announced its objective to file the license application no earlier than December 2004, an action which violates the NWPA and diminishes the effectiveness of the Presidential decision and the Congressional vote.

32. The prospect of DOE filing a license application for Yucca Mountain by December 2004 is highly doubtful. According to a September 6, 2002, report by Bechtel, Inc., the Yucca Mountain project contractor, the schedule leading to the submittal of the license application in December 2004 was based upon the assumption of a Congressional appropriation of $527 million for FY 2003. However, many years of past under-funding by Congress, and its recent appropriation for FY 2003 at an amount are far less than requested, can only result in further delay in the submission of the license application.

33. Even if and when DOE files an application for a construction license for the repository, the NRC then has up to four (4) years to reach a decision. (Section 114(d), 42 USC 10134(d)). After a period of years for construction, DOE must then apply for and receive approval of a license to operate Yucca

Mountain as a repository before the first shipment of SNF could be received. ("Recommendation by the Secretary of Energy Regarding the Suitability of the Yucca Mountain Site for a Repository Under the Nuclear Waste Policy Act of 1982", February 2002, p 2-3). Under the most optimistic view, it is extremely doubtful that DOE could begin receiving SNF at Yucca Mountain by its current target date of 2010. The U.S. General Accounting Office (GAO), Congress' investigatory agency, has challenged DOE's projected date for filing a license application, citing in part the size of DOE's backlog in completing a license application. Two other directly responsible review agencies, the NRC and the U.S. Nuclear Waste Technical Review Board have also raised doubts over the DOE's ability to meet its avowed 2010 goal, finding inadequacies and incompleteness in its scientific and technical work (Report to Congress and DOE Secretary, USTRB, April 2002, page 1). Recent information suggests that DOE's target date of 2010 is fading and that a further postponement will soon be announced. This history of delay and lack of performance adds to the growing skepticism over any federal promise of SNF disposal.

34. For many decades, the DOE has also been criticized for its poor management of its contractors, which is a critical problem given that 90 per cent of DOE's work is performed by contractors and the agency's annual appropriation is more than $20 billion. The GAO in a January 2003 report referred back to its 1990 designation of DOE's contract administration and project management "as a high-risk area" and that . . . "we maintain that designation in this year's high risk report." ("Major Management

Challenges and Program Risks – Department of Energy", GAO-03-100, January 2003, p 11). Citing the Yucca Mountain Site Characterization Project, GAO found that, because DOE has abandoned formal procedures to approve cost and schedule changes "--- DOE cannot ensure that the project is being managed effectively" (Id, p 14).

35. While disagreeing with both GAO's and Bechtel's longer time estimate to complete a license application, DOE nevertheless insisted that Bechtel generate a schedule so as to maintain the 2010 date. However, Bechtel's ensuing schedule requires significantly increased funding, which has not been forthcoming. Besides Bechtel, GAO, and other federal agencies, state utility regulators also recognize that the federal SNF disposal program can permanently fail due to the present and continuing failure of Congress to appropriate the necessary funds for repository licensing and development. A Joint Letter, dated November 18, 2002, signed by numerous representatives of the National Association of Regulatory Utility Commissioners (NARUC), including MPSC Chairman Laura Chappelle and Commissioner David A. Svanda, (Complaint Exhibit B), states that . . . "Congress is stuck in the past habit of chronically underfunding the program" . . . and that the . . . "Program has fallen victim to an unanticipated perversion of a well-designed user fee funding plan". The Joint Letter states that for FY 2001, Congress has appropriated only 10 per cent of that year's incremental SNF fee collections paid to or accumulated in the NWF (including accumulated earned interest on fee collections). Noting efforts by some in Congress to further reduce the current meager level of

appropriations for the disposal program, the Joint Letter states that . . . : "State regulators simply want the federal government to fulfill the vision of the nuclear waste compact agreed to in 1983" . . . and for . . . "the government to uphold its end of the bargain" and that: "You have our money: let's put it to use for its intended purpose." The Joint Letter also states that utility damage actions may cost the federal government billions of dollars in damages, which can only increase with each year of federal delay.

36. In a letter to President George W. Bush, dated December 20, 2002 (Complaint Exhibit C), Mr. LeRoy Koppendrayer, Commissioner (now Chairman) of the Minnesota Public Utilities Commission and also the Chair of the Nuclear Waste Strategy Coalition, an ad hoc group comprised of representatives of state utility regulators (including the MPSC), state attorneys general, nuclear utilities and associate members, states in part as follows:

> The Federal program, already in default of its requirement to open a facility by 1998, is again in danger of slipping further behind schedule. It is imperative that a long-range fix of the current Federal fiscal and funding mechanisms be implemented in the FY04 DOE Budget. . . .
>
> . . .
>
> Despite court decisions entitling utilities to recover damages for the Federal failure to meet its 1998 obligations, the Federal government has clung to a scheduled opening of the repository in 2010, or 12 years late. To meet this deadline, the DOE must file by 2004 a massive licensing application with the Nuclear

> Regulatory Commission for permission to operate the facility. The historical gross underfunding threatens, and should it continue, will guarantee failure of an application by that date. . . . .
>
> . . .
>
> . . . I ask for all means available to your Office to encourage extracting the disposal program not only from its current annual fiscal crisis, but also from the annual fiscal stranglehold it has been held under. . . .

37. The federal government displays little effort or interest in repairing the growing financial gap which threatens the program. Congress is expected to appropriate only about 7% of this year's incremental cumulations (SNF fees including interest) to the NWF for the disposal program for FY 2003. Congress has also repeatedly failed to adopt any budgetary repair to preserve the fund's stated balances as actual cash resources, such as by adopting a separate trust type mechanism to ensure adequate resources for the program. A February 25, 2003 Press Release issued by the Nuclear Waste Strategy Coalition, (Complaint Exhibit E), states that the inadequate finding and lack of reform of the funding process jeopardizes the federal program, escalates program costs by approximately $500 million annually, and that . . . "Further delay will cause grave implications and repercussions for the nation's energy supply, national security, consumers and the environment." Congress' destruction of the financial integrity of the NWF has also pitted the SNF disposal program against all other federal program funding. This is especially troubling now that the

present and foreseeable federal budget will incur massive deficits.

38. The combined effect of DOE's past and ongoing default of its statutory and contractual obligations, and of severe budget appropriation shortfalls, may be to indefinitely delay the submittal of a license application, and to cause a permanent failure by the federal government to develop or operate a repository. A permanent default may soon become obvious due to the increasing divergence between the presently estimated $59 billion cost to open the repository at Yucca Mountain compared to the meager appropriations being directed to the program. Meanwhile, the costs of the disposal program have been and continue to escalate over time and will increase or compound for each year that the program is delayed. A related factor which is creating a potential insurmountable future problem is the increased divergence between the higher SNF fee collections paid by ratepayers and utilities to the federal government, compared to the minimal annual appropriations approved by Congress for the disposal program. Congress is appropriating a very small portion of the SNF fee collections for the SNF disposal program. Meanwhile, Congress is actually using most of the SNF fee collections for general governmental purposes and not for the SNF disposal program, and is leaving essentially an unfunded IOU in the Nuclear Waste Fund. While the federal government has collected over $21 billion in SNF fees (including credited interest) through September 30, 2002, (Complaint Exhibit D), which collections are continuing, these sums in reality do not exist in any separate trust or cash account, but are mere

accounting figures retained by the Treasury Department. The cumulative effect of delays in the SNF disposal program is to create a future cost obligation which is so great compared to the actual cash resources available to the federal government (due to its expenditure each year of fee collections for other purposes) that Congress may never appropriate the necessary funds to actually complete the repository and commence SNF disposal.

39. A substantial risk thus exists that the federal government's continuing default of its statutory and contractual obligations to dispose SNF may become permanent. While the DOE Secretary and President have now recommended Yucca Mountain as a permanent repository, an extended multi-year process remains before Yucca Mountain could be licensed as the nation's repository. In the meantime, there may be a sequence of Administrations, DOE Secretaries, and Office Directors, which may alter or block the decisional path, which has occurred many times over the history of the federal program. If the federal government's delay in performing its SNF disposal duties continues, the federal government may soon find increasingly attractive a "no action alternative" (discussed in DOE's Draft Environmental Impact Statement, dated July 1999, pgs 2-59 to 2-88) wherein SNF is allowed to remain stranded indefinitely at nuclear plant sites at locations never intended or studied for said purpose, particularly as the cost of proper SNF disposal escalates through time, and the obligations for SNF disposal becomes too costly to obtain Congressional approval. While any future "no action" decision to simply leave the SNF at current plant sites will be a very "low cost" option for

the federal government, the resulting "default costs" upon the ratepayers and taxpayers of states would be extremely substantial, involving potentially scores or hundreds of billions of dollars. In testimony presented on behalf of the MPSC before the Sub-committee on Energy and Air Quality of the U.S. House of Representatives, dated April 18, 2002 (Complaint Exhibit F), MPSC Chairman Laura Chappelle, stated in part:

> Leaving spent fuel at current commercial and government storage sites indefinitely is not the solution to the waste disposal problem that the NWPA contemplated, over twenty years ago, by geologic disposal at a suitable site. The PECO settlement does not provide for geologic disposal nor has the Peach Bottom site or any of the other 71 reactor locations been studied for suitability for indefinite storage. The Yucca Mountain Environmental Impact Statement did a comparison of leaving nuclear waste at 77 commercial and government sites for the same 10,000 year period of isolation from the human environment as the geologic repository and found that two variations of the "No Action" approach were either going to cost $5 trillion dollars or have intolerable human and environmental consequences, depending on what assumptions were made about regulatory compliance for the sites once the reactors reach the end of their productive operating lives. There is no need for Congress to "explore" the PECO approach: the Environmental Impact Statement has already done that and the

financial or environmental consequences are simply unacceptable.

40. **Conclusion:** Due to the already experienced and continuing delays in the federal program, now over 50 years old, and escalating costs of the SNF repository program, a substantial risk and perverse incentive exists for the federal government to someday seek the cheapest alternative for reducing its own obligations, by permanently defaulting on its SNF disposal obligations and thereby leaving SNF disposal to utilities, ratepayers, and state governments (and thus their taxpayers). A number of cumulative factors give rise to the increasing risk that the federal government will never ultimately dispose SNF, including DOE's long-term unsatisfactory history of storing or disposing SNF; DOE's delays, broken promises, failed deadlines, and default under the NWPA; DOE's pattern of self-excusing its delays and its attempts to shift all resulting burdens to others; DOE's demonstrated management problems; Congress' long-term program underfunding; increasing costs of SNF disposal; financial incentives for the federal government to indefinitely use portions of SNF fee collections for general non-SNF government programs; the incentive for the Congress to collect the funds, to default, and leave SNF stranded at the plants; risks arising from NRC licensing procedures and extended litigation; among other factors.

V. RESPONDENT UTILITIES' RATES ARE UNJUST AND UNREASONABLE BECAUSE THEY INCLUDE INCREASING AND DUPLICATIVE COSTS AND FINANCIAL RISKS OF SNF STORAGE AND DISPOSAL,

INCLUDING THE COSTS OF THE SNF FEE FOR A FEDERAL PROGRAM WHICH HAS BEEN IN DEFAULT SINCE 1998 AND WHICH MAY NEVER PERFORM SNF DISPOSAL.

41. The rates of respondent nuclear utilities are unjust and unreasonable because they include broad categories of duplicative and escalating SNF storage and disposal costs (and financial risks) for: (i) the on-going federal SNF fees for a federal program which has been in default since 1998 and may never dispose SNF, and which has experienced a failure in the direct statutory and contractual quid pro quo or bargain between the payment of SNF fees in exchange for federal SNF disposal commencing on January 31, 1998; (ii) substantial incremental costs incurred by utilities to provide for SNF storage for longer periods than contemplated due to the default in the federal program; these include costs to develop additional SNF storage in pools and dry storage facilities at utility plant sites, and associated costs for ongoing long-term operation, maintenance, monitoring, and provision of security; (iii) increased nuclear plant decommissioning costs due to the presence of SNF on-site at the end of the plant's operational life for longer periods and in larger amounts than was anticipated at the time the plants were designed and constructed; and (iv) the insurmountable costs for SNF disposal if the utilities and the federal government never fulfill their obligations, which are unknown but could be comparable to or greater than DOE's present estimated costs of $59 billion for the program.

42. With respect to the federal SNF fee, nuclear utilities nationally have collected billions of dollars

from ratepayers for the SNF fees, which costs have up to now been fully recognized in rates regulated by state commissions, including the MPSC with respect to Michigan's nuclear utilities. The value of utility fee payments to the NWF, and utility-held SNF fee debt, all charged to ratepayers, including accumulated interest credits, totals over $21 billion as of September 30, 2002. Of this amount, $458.8 million has been allocated to and collected from Michigan's ratepayers (Complaint Exhibit D). The net value of these SNF funds (including interest credits) collected from ratepayers by respondent utilities is as follows:

Respondent Utilities' SNF Fee Collections From Ratepayers[1]

(A) Utility	(B) Net Payments to NWF[2]	(C) Utility SNF Debt (And Interest) Collected From Ratepayers
Consumers Energy Company	76,058,221	137,686,712
Detroit Edison Company	88,467,292	-0-
* Indiana Michigan Power Company[3]	181,708,392	223,735,984
* Wisconsin Electric Power Company[3]	123,626,641	-0-

* Wisconsin Public Service Corporation[3]	67,250,142	-0-

[1] Obtained from reports supplied to the MPSC Staff by DOE, for the period ending December 31, 2002 (Complaint Exhibit A hereto, pp 1-7.)

[2] Net amounts collected and paid to federal government for post-April 7, 1983 generation, after subtractions of credits or calculation corrections.

[3] These utilities have operations and sales in Michigan and other states. A portion of these amounts are allocated to Michigan customers, estimated at 13-17 percent for IM; 2.5 to 9.8 percent for WEPCo; and 2 percent for WPSCorp).

The amounts shown in column (C) above relate to hold-back amounts (SNF fee debt) of utilities representing SNF fees (and interest) collected from ratepayers for pre-April 7, 1983 generation, but which have **not** been paid by the utilities to the federal government, an option permitted under DOE's Standard Contract. CECo continues to internally hold and use these funds. IM, however, transferred its Michigan-allocated portion of these pre-April 1983 amounts to a separate MPSC-regulated external nuclear decommissioning trust fund, pursuant to the Commission's order in MPSC case U-11237, dated November 26, 1996.

43. Respondent utilities have up to now included all their costs for SNF handling, storage and disposal, including SNF fees, in their cost of service for ratemaking purposes, through Act 304 rate factors,

decommissioning charges, and base rates. The exact amounts of these costs a e potentially known only by the utilities themselves as the MPSC up to now has not required the utilities to adequately detail and report said costs. The utilities also may not yet have segregated and reported these costs in view of the lack of any MPSC order requiring such focused reporting and review. While the ultimate cost and rate obligations are unknown, SNF fee collections (including interest credits) by respondent utilities from Michigan ratepayers may well equal in excess of a billion dollars within several years and the cost of any alternative SNF disposal in the event of a permanent federal default may easily equal several billion dollars. In the meantime, hundreds of millions of dollars in SNF storage costs may also be incurred and charged to ratepayers.

44. In testimony presented to the Subcommittee on Energy and Air Quality of the U.S. House of Representatives on April 18, 2002, Laura Chappelle, Chairman of the MPSC, testifying on behalf of the National Association of Regulatory Utility Commissioners (NARUC) and the MPSC (Complaint Exhibit F hereto), expressed great concern regarding the impact upon ratepayers of these SNF fee collections in view of the lack of progress in the federal SNF program. The MPSC Chairman observed:

> . . . that passing the costs of the NWF on to the ratepayers has been the only aspect of the NWPA to begin on schedule. . . .
>
> Most importantly, we represent ratepayers in 41 States who have, in good faith, paid over $19

billion into the Nuclear Waste Fund (including interest) and have little to show for it. The $19 billion consists of $17 billion that has been paid by the utilities into Federal Nuclear Waste Fund, and a little more than $2 billion in debt to the Fund that some utilities have elected to hold until a future date. Under any circumstances, the utility ratepayers that are represented by NARUC's members have paid the fees required to pay for this program. Worse, they have also had to pay utilities that had to bear additional on-site waste storage expenses when DOE missed the 1998 date to begin removing the fuel. In my State of Michigan, ratepayers have paid over $430 million into the Fund and I have to explain to them that it will be at least another eight years before they see any return on that investment. In fact, among the States, we often ask, "Why, after DOE failed to meet its contracted 1998 deadline, are we still paying that fee?

45. The statutory and contractual default by the federal government to commence disposal of SNF by January 31, 1998, constitutes a failure in the reciprocal quid pro quo or bargain between the payment of SNF fees in exchange for the disposal of SNF. The result is that the interests of ratepayers and the public are rendered wholly insecure. No proper legal basis justifies an apparent result whereby the payment of SNF fees in rates should continue unchallenged and unfettered indefinitely, while DOE's default in the performance of SNF disposal continues indefinitely or permanently.

46. **Conclusion:** The rates of respondent utilities are unjust, unreasonable, and improper, both presently and on a long-term structural basis, because they include all of the escalating and duplicative costs and financial risks of SNF storage, disposal, and ongoing SNF fees, as identified in paragraphs 41-44, *supra*, and presumes ratepayer liability for all future SNF costs, on a virtual endless flow-through basis, at the same time that the NWPA established the national policy that these costs are the responsibility of the generators and owners of SNF, not necessarily ratepayers. These costs, financial risks, and liabilities are enormous given that the federal government has already defaulted in its statutory and contractual SNF disposal obligations, and the prospect that the federal government may never perform these obligations.

VI. RESPONDENT UTILITIES' ACTIONS, PRACTICES, AND OMISSIONS WITH RESPECT TO SNF FEE, STORAGE, AND DISPOSAL MATTERS, AND ASSOCIATED SNF COSTS, HAVE BEEN UNREASONABLE, AND IMPRUDENT, AND CONTRARY TO THE UTILITIES' LAWFUL DUTIES.

47. Respondent utilities have played a major principal role in the present insecurity that Michigan ratepayers face with respect to SNF storage and disposal matters, and the increasing and duplicative costs and financial risks relating to SNF fees, storage, and disposal.

48. Respondent utilities, with limited exceptions, have committed actions and omissions, and

have engaged in practices, which are, overall, unreasonable and imprudent, and which violate their lawful duties, with respect to SNF fee, storage, and disposal matters, and associated SNF costs, as follows:

a. utilities entered into the business of generating nuclear energy and SNF decades ago without any clear national SNF disposal solution; thereafter, utilities failed to undertake meaningful actions to ensure the success of any of the SNF disposal programs throughout the decades prior to the NWPA; for the first 12 years after adoption of the NWPA in 1982, the utilities again failed to effectively address or challenge DOE's continual delays, failures, and mismanagement, despite extensive utility expertise and investment in nuclear generation; on an overall basis, the respondent utilities throughout their generation of SNF have provided little counsel, assistance, or management oversight to ensure progress in the federal SNF disposal program;

b. respondent utilities have primarily relied on a strategy to continue to generate SNF, to flow through all increasing SNF fee, storage, and disposal costs to ratepayers in rates, and to transfer the financial risk and obligations associated with their SNF sites to the state's ratepayers and taxpayers in the event of a permanent federal default; respondent utilities also have developed no known contingency plan to undertake the responsibility for SNF disposal in the event of a permanent default by the federal government; the respondent utilities as generators and owners of the SNF and nuclear plants are thus not accepting their primary responsibility to assume the financial risk and obligation of SNF storage and

disposal, and are creating a potential huge liability for SNF disposal upon ratepayers and taxpayers; respondent utilities have thus proceeded pursuant to an extremely narrow view of their own responsibilities to store or dispose SNF, despite decades of failures and delays in the federal SNF disposal program;

c. the utilities' response to the federal delays and inaction in the performance of its statutory and contractual obligations has been generally limited, late, and inadequate; for many years, in the face of broken DOE promises and deadlines, respondent utilities failed to adequately enforce their statutory and contractual rights under the NWPA relating to SNF disposal;

d. even in the face of a clear approaching default by DOE in meeting the 1998 deadline, respondent utilities did nothing; only after some states and state commissions started demanding corrective action did one or two of respondent utilities show some interest in enforcing their statutory and contractual rights; in the face of the anticipatory default, only IM Power among the respondent utilities joined in the two seminal lawsuits, *Indiana Michigan Power and Northern States Power*, which sought to address the egregious situation;

e. while most but not all of respondent utilities have now filed actions in the United States Court of Federal Claims to seek damages for their increased SNF costs resulting from the federal default, the respondent utilities, whether filing damage actions or not, have failed to formally ensure that ratepayers

will be reimbursed from any Court-ordered recoveries for these ratepayer-paid costs;

f. on information and belief, while the various Court of Federal Claims cases seek damages or reimbursement of increased costs, the actions do not address, protect, escrow, or seek reimbursement of any of the past, present, and future SNF fees being paid to the federal government in the event of a permanent default by the federal government with respect to SNF disposal; ratepayers thus face the risk of the total loss of the value of all SNF fee payments to defray SNF disposal in the event of such a default.

49. Respondent utilities' unreasonable and imprudent actions, practices, and omissions with respect to SNF fee, storage, and disposal matters, and associated costs, and failure to uphold or share in SNF disposal responsibilities, also constitute violations of various rate statutes which are administered and enforced by the Commission, which require utilities to undertake and uphold their independent duty to refrain from said unreasonable and imprudent actions, practices, and omissions, and to ensure the establishment and maintenance of just and reasonable rates (Section 4, MCL 462.4, Section 7, MCL 460.557; Act 304 provisions and other statutes cited in paragraphs 15-16, *supra*).

50. Respondent utilities' actions, practices, and omissions also constitute a failure to comply with Act 304's provisions, cited in paragraph 15, *supra*, establishing the "reasonableness and prudence" standard applicable to energy generation and acquisition, and of respondent utilities' duty "to

minimize the cost of fuel to the utility". Respondent utilities have failed to undertake adequate steps to avoid, minimize, or mitigate the substantial costs and financial risks and liabilities relating to SNF storage and disposal.

51. Respondent utilities have and continue to violate Section 6j(13)(j) of Act 304, MCL 4650.6j(13)(j), by failing to file applications to seek the prior approval of the Commission before incurring increased costs to be charged to ratepayers for nuclear fuel disposal; instead, without Commission review and approval, respondent utilities are incurring and charging ratepayers, each and every year, for increased and duplicative SNF costs and are effectively transferring to ratepayers and taxpayers enormous financial risks and liabilities relating to SNF fees, storage, decommissioning, and disposal.

52. **Conclusion:** Respondent utilities' actions, practices, and omissions, with respect to SNF matters and associated costs have been unreasonable, imprudent, and contrary to the utilities' own lawful duties: (a) to refrain from such conduct, (b) to maintain and ensure just and reasonable rates, and to minimize costs to the consuming public, and (c) to seek Commission review and approval before incurring or charging ratepayers for increased costs (and financial risks and obligations) relating to SNF disposal.

VII. THE COMMISSION MUST INVESTIGATE, REGULATE, AND ADOPT EFFECTIVE REMEDIES WITH RESPECT TO SNF FEE, STORAGE, AND DISPOSAL COSTS IN ORDER TO: (1) CARRY OUT ITS

AUTHORITY AND DUTY TO SET AND MAINTAIN LAWFUL AND REASONABLE RATES; (2) TO ADDRESS AND REMEDY RESPONDENT UTILITIES UNREASONABLE AND IMPRUDENT ACTIONS, PRACTICES, AND OMISSIONS; AND (3) TO RESPOND TO THE COMPELLING NEED FOR REMEDIAL REGULATORY ACTION AND OVERSIGHT.

53. The Commission must act promptly to investigate, regulate, and adopt viable long-term remedies relative to SNF fee, storage, and disposal costs in order to carry out its mandated authority and duty to establish and maintain lawful and reasonable rates for respondent utilities, and to address and remedy the unreasonable actions, practices, and omissions of respondent utilities, and to respond to the compelling need for remedial regulatory action and oversight. Without such regulatory actions, Michigan ratepayers will, by Commission inaction, be assigned all increasing, duplicative, and compounding costs and financial risks for SNF which ultimately could total billions of dollars.

54. **Only the MPSC, by action or inaction, is responsible for permitting SNF costs and risks to be flowed through into customer rates.** No provision of federal law, such as the NWPA, assigns these SNF costs and risks to Michigan ratepayers. The Commission may exercise its own broad independent authority, under the sphere of utility rate regulation assigned by Congress to the states, to determine what portion of SNF costs are to be paid by ratepayers, as

opposed to the generators and owners of SNF. *Pacific Gas & Electric*; FPA Section 201(b), *supra*.

55. Continued failure of the Commission to investigate, review, and remedy SNF cost increases, overruns, and growing cost liabilities and risks, would be unlawful and unreasonable, because it:

a. ignores the primary purpose for creation of the Commission, which is to protect ratepayers and the public interest; the Court in *C & O R Co v Public Service Commission*, 59 Mich App 88, 94-95 (1975), admonished that "The. . . commission was originally established to protect the consumer." and that "(T)he Legislature sought to remedy the imbalance between utilities and the consumer by creating an agency which would be a watchdog for and representative of the consumer." . . . (and) . . . " to vigorously regulate all public utilities . . .".

b. violates the constitutional and statutory standard, and judicial precedent, which requires rates to be "just and reasonable," and which assigns to the Commission the authority and duty to establish and maintain just and reasonable rates (paragraph 15, *supra*).

c. violates the Michigan Supreme Court's holding in *City of Detroit v Michigan Public Service Commission*, 308 Mich 706 (1944) that the Commission's duty is to set just and reasonable rates by balancing the interests of utilities and ratepayers, and that in so doing, the Commission may not disclaim its authority to exclude expenses "which place unnecessary burdens upon the consumer." The court

held that "[I]t could not have been the intent of the Legislature that the Commission should lack any necessary power to fix reasonable rates, and the Commission should not be permitted to declare itself impotent." This Commission, therefore, may not abstain or abandon its duty to determine what portion, if any, ratepayers should pay for SNF costs and what cost, liabilities, and risks remain the responsibilities of the utility as the generators and owners of SNF.

d. violates the ratemaking statutes and MAPA by causing an arbitrary, capricious, and unduly discriminatory result; by failing to review and remedy increasing SNF costs, liabilities, and financial risks, the Commission is thereby essentially permitting the automatic flow-through of such costs and liabilities in rates, and is treating utility cost claims as *carte blanche* reasonable and essentially unreviewable; the Commission cannot lawfully and reasonably determine that it is within the Commission's authority to flow through in rates, *carte blanche*, all SNF costs, apparently indefinitely, while also holding that it is beyond the Commission's authority to consider ratemaking issues and remedies to protect ratepayers relative to the very same costs under the very same regulatory statutes.

e. violates Congress' policy in the NWPA that the generators and owners of SNF pay these costs (paragraph 21, *supra*), by failing to even consider that all or at least a portion of SNF costs should be paid by utilities;

f. fails to enforce the statutory requirement that respondent utilities obtain the prior approval of

the Commission before charging for increased costs of nuclear fuel disposal (paragraphs 15 and 51, *supra*); respondent utilities in base rates and Act 304 rate factors are charging and obligating ratepayers to pay or assume increased and cumulative SNF costs and financial risks for each and every year that goes by, without Commission review.

g. fails to carry out its mandated authority and duty to address and remedy the unreasonable actions, practices, and omissions of respondent utilities, (paragraphs 16, 17, 47-52, *supra*); by failing to undertake active regulatory oversight of respondent utilities' conduct regarding SNF matters, and the resulting impact upon SNF costs and rates, the Commission each year is increasing and compounding the financial harm and prejudice to ratepayers, along with increasing the financial risk that ratepayers and taxpayers will become obligated to pay potentially billions of dollars by the time nuclear plants are closed and their sites are filled with SNF. The Commission will be unable at a later time to protect the ratepayer by retroactively making rate adjustments or by asserting terms and conditions applicable to rate collections for SNF costs, under the familiar retroactive ratemaking doctrine. *Michigan Consolidated Gas v PSC*, 389 Mich 624 (1973). Commission present inaction and failure to assert active regulatory oversight over SNF costs and rate impacts is therefore unlawful and unreasonable, and has been so demonstrated ever since the federal default as of January 31, 1998, and for every year thereafter.

56. The Commission's refusal to effectively review and remedy SNF cost issues on behalf of ratepayers is increasingly doubtful and inexplicable given the compelling need for such regulatory action because:

a. The Commission is the **only** regulatory entity that can, on behalf of ratepayers, protect the value of SNF fees collected in rates to ensure their preservation for SNF disposal, to prevent duplicative cost pass-throughs to ratepayers, or to provide a contingent mechanism for refund of the value of the fees in the event of a permanent failure in SNF disposal; the various damage suits filed in the U.S. Court of Federal Claims by some nuclear utilities to seek reimbursement of increased costs to utilities resulting from the federal default do **not** include requests for a refund of the fees, or provide any protection of the fees being collected in the event of a permanent default in the federal program;

b. The Commission is the **only** entity that can ensure reimbursement to ratepayers of any damage awards ultimately obtained by respondent utilities through the United States Court of Federal Claims; if utilities sought and obtained damage awards for increased costs incurred for SNF storage due to the federal default (which costs utilities include in rates) there is no requirement, absent MPSC regulatory action, that utilities will reimburse ratepayers for said damage awards;

c. The *Alabama Power* case, while it may now discourage DOE from attempting to enter into future settlements to absolve it from the responsibility

of disposing SNF and the costs of delay, also does nothing to ensure disposal of SNF, or to protect ratepayers for the value of SNF fees, or to provide for cost reimbursement of damage awards, as noted in (a) and (b) above.

d. The Commission currently is not adequately informed concerning the amount of SNF fee and storage costs, the higher costs to decommission nuclear plant sites, the impact upon both Act 304 and base rates, and other risks to ratepayers and the public interest resulting from DOE's default and the potential of a permanent failure in the federal SNF disposal program; closer scrutiny of the SNF costs and rate impacts is necessary to ensure the Commission can take meaningful regulatory action to protect ratepayers now and in the future;

e. The Commission may not lawfully and reasonably abstain from its regulatory duties until any permanent default occurs, at which time respondent utilities will escape from huge SNF liabilities and dump the cost of disposal again upon the ratepayers or state taxpayers. Experience obtained from analogous situations where industry has caused waste or other damages demonstrate that state ratepayers and taxpayers are at great risk relative to paying the resulting costs (e.g. *Peninsular Gas Company*, U-11127, Orders dated July 31, 1997, and February 2, 1999; and U-10630-R, dated June 2, 1998); *PBB Action Committee v DNR*, 403 Mich 206 (1978); the Commission should undertake a long-term approach to reviewing and regulating SNF costs to fully protect against this risk;

f. The ongoing restructuring of the electric industry, and the associated trends of utility disaggregation, mergers, nuclear plant sales and license transfers, financial uncertainties, and related developments, blurs long-term accountability and financial responsibility for secure SNF storage and disposal, making it more likely that respondent utilities can restructure themselves on a long-term basis to escape their responsibility and all costs for SNF disposal; while nuclear plants are a profit-making asset to utilities when they are generating electricity, the plants and their stockpiles of SNF represent nothing but a vast liability once the plants close; there exists no effective statute or other bar which prevents a utility over time from restructuring its corporation and financial assets away from its SNF storage facilities, so as to ultimately transfer to the public all financial, economic and environmental risk relating thereto; as an example, this could be accomplished by creating, isolating, and then bankrupting a special purpose "SNF facility corporation," having no assets except a huge SNF liability, and then leaving the burden solely upon the public. The only effective way to deal with this risk, and to prevent such an eventuality, is for the state public service commission having rate jurisdiction over the utility to undertake far more effective regulation over SNF costs and rates, and by implementing now and for the long-term future (and until the SNF is ultimately successfully disposed) fair and balanced remedies to protect ratepayers and the public interest;

g. The MPSC has an independent statutory duty to protect Michigan's ratepayers and the public interest, and cannot merely assume that the

respondent utilities' management, whose fiduciary duty is to protect utility shareholders, can adequately perform this function on behalf of the ratepaying public; and

h. The need and opportunity to further the interests of ratepayers and the overall public interest is now greater than ever; the federal default, and indefinite storage or disposal of SNF at plant sites, and particularly with respect to Michigan SNF sites, increases the risks that: (1) Michigan, as a sovereign state, and its ratepayers or taxpayers, may ultimately bear the responsibility and increased cost of paying for the disposal or storage of SNF; (2) Michigan's citizens, and natural resources and environment, will be endangered on a long-term basis, particularly since SNF sites are located near Michigan's lakeshores, water resources, and population centers, and (3) Michigan's long-term security and safety may be reduced, since SNF storage technologies have a limited life and in view of the current threats to the national security. These public interest concerns are identified in DOE Secretary Abraham's February 14, 2002, letter to the President, and his accompanying formal recommendation for approval of the Yucca Mountain site for development of a repository. The Secretary's letter (p 3) states that: "A repository is important to our homeland security". . . and . . . "to our efforts to protect the environment." The Secretary's Formal Recommendation, states in part:

> . . . Most commercial spent fuel storage facilities are near large populations centers; . . . These storage sites also tend to be near rivers, lakes, and seacoasts. Should a radioactive release

occur from one of these older, less robust facilities, it could contaminate any of 20 major waterways, including the Mississippi River. Over 30 million Americans are served by these potentially at-risk water sources. (p 2)

. . .

In addition, under the NWPA, the Federal government is also responsible for disposing of spent commercial fuel, a program that was to have begun in 1998, four years ago. More than 161 million Americans, well more than half the population, reside within 75 miles of a major nuclear facility – and, thus, within 75 miles of that facility's aging and temporary capacity for storing this material. Moreover, because nuclear reactors require abundant water for cooling, on-site storage tends to be located near rivers, lakes, and seacoasts. Ten closed facilities, such as Big Rock Point, on the banks of Lake Michigan, also house spent fuel and incur significant annual costs without providing any ongoing benefit. Over the long-term, without active management and monitoring, degrading surface storage facilities may pose a risk to any of 20 major U.S. lakes and waterways, including the Mississippi River. Millions of Americans are served by municipal water systems with intakes along these waterways. In recent letters, Governors Bob Taft of Ohio and John Engler of Michigan raised concerns about the advisability of long-term storage of spent fuel in temporary systems so close to major bodies of water. . . . (p 29)

. . .

> As I have noted previously, spent fuel and other high level radioactive waste is presently stored at temporary storage facilities at 131 locations in 39 states. Ten of these are at shutdown reactor sites for which security would not otherwise be required. Moreover, many reactors are approaching their storage capacity and are likely to seek some form of off-site storage, thereby creating potential new targets. (p 30)
>
> . . .
>
> . . . Most of the wastes left where they are in or near dozens of towns (and cities) continue to accumulate day-by-day in temporary facilities not intended for long-term storage or disposal. (p 38)

57. **Conclusion:** The Commission must act to investigate and adopt remedies concerning these SNF matters and costs, and to protect ratepayers and the public interest, to: (a) ensure, establish, and maintain just and reasonable rates for respondent utilities over time; (b) balance the interests of ratepayers and utilities by ensuring that respondent utilities at least share in the responsibility and financial risk related to the storage and disposal of SNF which they generate; (c) address the unreasonable actions, practices, and omissions of the respondent utilities; and (d) to recognize several other public interest concerns, in addition to the substantial costs and risks to ratepayers, which compel such regulatory action.

VIII. REQUESTED REMEDIES

58. Complainants request the adoption of various "**collect but protect remedies**", which would protect and preserve rate collections for SNF fee, storage, and disposal costs, through various recognized terms and conditions to effect a sharing of the financial costs and risks of SNF storage and disposal between ratepayers and utilities and to ensure the availability of funds to address SNF storage and disposal solutions on a long-term basis. These remedies (subsections A through F, paragraphs 61 through 75, *infra*), incorporate traditionally employed financial assurance mechanisms recognized by the NRC to ensure utility financial responsibility for the decommissioning of nuclear plant and SNF storage sites to "greenfield" conditions within a reasonable time following the closure of plants. As an alternative, Complainants in subsection G, paragraphs 76-77, *infra*, request the Commission to order downward rate reductions for respondent utilities to ensure ratepayers are not charged for increasing and duplicating SNF costs.

59. Complainants' requested remedies are consistent with the Commission's jurisdiction and authority under state law, including specifically, amendments adopted pursuant to the "Customer Choice and Electricity Reliability Act", 2000 PA 141, ("Act 141"), MCL 460.10 *et seq.* While requested remedies sought in subsection A-F, *infra*, seek greater MPSC scrutiny of SNF-related costs and increased protection or sequestering of rate collections, they do not require a reduction in the level of rates or charges collected from ratepayers by respondent utilities. While the alternative remedies in subsection G do

request rate reductions, such relief can be determined and implemented in a manner that is consistent with any temporary rate caps or freezes legislated in Act 141, which will expire relatively soon and far ahead of any permanent SNF disposal by respondent utilities or the federal government.

60. Complainants' remedies are also consistent with and fully recognized under federal law, including the NWPA and the regulations of the NRC (discussed *supra*, paragraphs 21-22). On an overall basis, NRC rules, and as recently amended, establish that the NRC supports:

(a) greater assurance of the adequacy of funds to decommission nuclear plant sites in an era typified by increasing utility industry restructuring and state deregulation of utilities; the NRC also fully recognizes continued state authority over decommissioning trusts and rates (and related assurances) where nuclear utilities remain subject to state regulatory authority; the GAO has also recognized state regulatory agency authority over the regulation of decommissioning funds for nuclear utility subject to their retail rate jurisdiction, and also has stated concern that additional protections must be undertaken to ensure the adequacy and preservation of the decommissioning funds in view of the restructuring and deregulation of the electric industry costs. *Nuclear Regulation: NRC's Assurances of Decommissioning Funding During Utility Restructuring Could Be Improved*, December 2001, (GAO-02-48);

(b) continued recognition of various financial assurance methods for decommissioning such as: (1) prepayment or external sinking fund methods (10 CFR § 50.75 and 10 CFR § 72.30) which provide for deposits in a segregated account, separate from the licensee's assets or control, of sufficient funds to pay decommissioning costs, which may be in the form of a trust, escrow account, government fund, certificate of deposit, or deposit of government securities, or other payment acceptable to the NRC (§ 72.30(c)(1) and (c)(3); § 50.75 (e)(1)(i) and (ii); (2) a surety method such as a surety bond, letter of credit, line of credit, insurance, or other guarantee methods such as a parent company guarantee of funds for decommissioning costs based on a financial test, § 50.30(e)(2); this surety method or insurance must be payable to a trust established for decommissioning costs; an acceptable trustee can include an appropriate state or federal government agency or an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency, § 50.30(c)(2)(ii), § 50.75(e)(1)(iii); and (3) any other mechanism, or combination of mechanisms determined by the NRC to be equivalent thereto, such as an external sinking fund in combination with a guarantee mechanism, § 50.75(e)(1)(vi);

(c) continued adherence to the requirement that nuclear utilities plan for and provide financial assurances to ensure that nuclear sites; including SNF storage sites, are fully decommissioned; the NRC has left unchanged its regulations which relate to the preparation of management and financial plans to decommission SNF sites, and to manage SNF until it is transferred to the DOE for disposal, 10 CFR

§ 72.30(a) and (b), and 10 CFR 50.54(bb). The NRC's 2002 rulemaking process also expressly confirms and preserves the authority of state commissions to require such enhanced assurances and funding mechanisms over and above those required by the NRC to assure decommissioning and ultimate SNF disposal (67 FR78339-78344);

(d) the specific forms and methods of additional financial security as proposed by Complainants; in this regard, NRC's Regulatory Guide 1.159, which provides guidance as to how to comply with NRC regulations (included in part in Complaint Exhibit G) includes a Glossary of Financial Terms, and sample agreements or financial instruments which can be used to implement various forms of financial assurances as sought by Complainants in this case (e.g., Sample Escrow Agreement, Certificates of Deposit, Trust Fund Agreement, Standby Trust Agreement, Payment Surety Bond, Standby Letter of Credit, and Corporate Guarantee by Parent Company). The NRC's Regulations and Guide also respect state law and authority by indicating that said financial assurances and forms should be conformed to state law requirements (67 FR 78339-78340, 78342-78344 (2002); Guide 1.159, NRC website copy, pg 1, 12, 14-15; and Exhibit G). Complainants' remedies are thus fully recognized by the NRC.

A. <u>Commencement Of Generic Investigation And Formal Contested Case Proceeding:</u> The Commission Should Commence A Formal Generic Investigation And Contested Case Proceeding To Fully Review All Relevant Facts And Issues

Concerning SNF Fee, Storage, And Disposal Costs, And To Consider Adoption Of Appropriate Remedies To Protect Ratepayers And The Public Interest.

61. The Commission should commence a formal generic investigation and contested case proceeding involving all of the respondent utilities to fully review all relevant facts and issues concerning SNF storage and disposal costs, and to consider the adoption of appropriate remedies to protect ratepayers and the public interest. A generic investigation and proceeding would provide: (a) an ongoing focused review of SNF cost and rate issues relating to all respondent utilities, which will complement each utility's ongoing base rate, Act 304, and nuclear plant decommissioning cases; and (b) a long-term mechanism to develop and implement a strategy to ensure that: (i) SNF does not become stranded and abandoned at plant sites, at the same time that hundreds of millions of no-longer-available dollars are collected from Michigan ratepayers for both SNF fees and on-site SNF storage; (ii) the proper decommissioning of plant sites, including proper disposal of SNF, is ultimately accomplished; and (iii) state ratepayers and taxpayers are fully protected from unwarranted SNF storage or disposal costs or liabilities, and are not left to pay again billions of dollars to dispose SNF in the event of a permanent federal and utility default in SNF disposal.

62. In any Commission order commencing a generic case investigation and contested case rate review concerning SNF costs and rate issues, the Commission should require all respondent nuclear utilities to file complete reports, information, and

prefiled testimony, and to participate in contested case hearings and briefing concerning: (a) the past, present, and ongoing costs and rate collections for all SNF fees, and all additional costs (both direct and indirect) incurred, being incurred, or to be incurred to provide for on-site SNF storage or disposal, and also showing the incremental SNF costs attributable in any manner to the federal government's default or delay in accepting and removing SNF from plant sites for disposal; (b) all actions, strategies, proposals, or remedies which the utilities have or have not undertaken, or should or will undertake to fully protect Michigan's ratepayers, and the state's public interest, relative to SNF storage and disposal, and related cost and rate issues; (c) whether each utility has filed damage claims in the United States Court of Federal Claims for reimbursement of damages and increased costs relating to the federal default and delay; the full scope and nature of their claims and filings; and whether each utility will pledge to credit rates with net awards obtained from the Court; (d) all other efforts and actions undertaken or considered by each respondent utility to: (i) enforce their Standard Contract; (ii) obtain specific federal SNF disposal performance; (iii) and to fully protect the interest of ratepayers and the public interest; and (e) all contingency plans or options being considered by the utility to accomplish SNF disposal in the event of a permanent default by the federal government relative to SNF disposal, and to refund SNF fees to ratepayers in such event.

63. The Commission's authority to undertake a generic investigation into SNF cost and rate issues is confirmed by the Commission's January 28, 1997 order

in U-11314 commencing an informal non-contested investigation regarding SNF issues, based upon the Commission's finding it had such authority. The Commission, however, closed the docket on December 4, 2000, without any findings. The Commission commenced the U-11314 docket **before** the DOE defaulted on its 1998 statutory and contractual deadline. The need for a suitable Commission inquiry, in the form of a formal contested case, is even more compelling now.

64. The Commission, after hearings, briefing, and contested case procedures, participated in by all interested parties, should proceed to issue a final order to fully protect ratepayers and the public interest with respect to SNF storage and disposal, and related cost and rate issues on a long term basis.

B. <u>Focused Review Of SNF Fee, Storage, and Disposal Costs In All Rate And PSCR Cases And Associated Filing Requirements:</u> The Commission Should Undertake Enhanced Rate Review Remedies Concerning SNF Costs And Rates In All General Rate And Act 304 Power Supply Cost Recovery Cases Involving Respondent Utilities.

65. In addition to a formal generic contested case, the Commission should undertake an ongoing focused review of all SNF cost and rate issues, and remedies, in all future general rate and Act 304 power supply cost recovery cases involving respondent nuclear utilities. This "enhanced rate review remedy", in conjunction with the generic investigation, can be utilized to ensure thorough rate reviews and the

enforcement of appropriate ratemaking remedies specific to each of the respondent utilities. The Commission should also institute filing requirements, similar to the Standard Filing Requirements approved by Commission order in Case No. U-4771, to ensure that each of respondent utilities' rate and PSCR applications, testimony and exhibits, and related documents, fully detail all costs incurred to store or dispose SNF, to pay for the federal SNF fee, and the resulting rate recoveries being requested. The Commission in each case should adopt appropriate rate remedies and conditions to fully protect ratepayers and the public interest on an on-going long-term basis until SNF held by each utility is properly disposed.

66. This remedy easily fits within the Commission's existing regulatory rate review powers and, in fact, is a conservative straight-forward remedy. The Commission undertook similar action in PSCR plan cases for CECo (Case U-10710, Order dated December 20, 1995) and for DECo (Case U-10702, Order dated February 23, 1995).

C. <u>Annual Reporting, Audits, And Supplemental Decommissioning Reports:</u> The Commission Should Require The Filing Of Annual Reports, Additional And Separate Decommissioning Reports, And Undertake A Review And Audit Of Nuclear Utilities' Books And Records, To Fully Monitor All SNF Costs And Rate Impacts.

67. The Commission should exercise its broad jurisdiction and authority over utilities' books of

accounts, and power to undertake investigations, audits, and reviews of the financial books and records of utilities, by undertaking such reviews relative to SNF costs involving respondent nuclear utilities. The Commission should require annual reports regarding the SNF costs, SNF fee collections, and incremental ongoing costs incurred due to the federal default, in a form and manner which aids the Commission's review and regulation of the SNF cost issues. The MPSC should also require respondent utilities to commence reporting to the MPSC on a formal basis, no less than annually, on all efforts undertaken to administer and enforce their Standard Contracts with the DOE, to seek federal reimbursement of costs or damages, and to develop contingency plans and alternatives for SNF storage and disposal in the event the federal government fails to carry out its obligations for the storage and disposal of SNF. The reports could include all estimated costs to undertake various alternative actions.

D. <u>Reclassification And Transfer To Separate External Decommissioning Trusts Of SNF Fees Collected From Ratepayers But Not Paid To The Federal Government</u>: The Commission Should Promptly Reclassify And Regulate As A Separate External Nuclear SNF Site Decommissioning Trust Fund The $137.6 Million (Including Interest) In Utility SNF Fee Debt Which CECo Has Collected From Ratepayers But Has Never Paid To The Federal Government.

68. The Commission pursuant to this case should promptly reclassify and regulate as a separate external nuclear SNF decommissioning trust, the entire $137.6 million (including interest) in utility SNF fee debt balances (as of December 31, 2002, plus interest credits until the date of transfer) which CECo has collected from Michigan ratepayers for SNF fees but has never paid to the federal government. These SNF fee collections relate to nuclear energy generated and sold by CECo before April 7, 1983.

69. The Commission's authority to undertake this remedy is confirmed by its decision in *In re Indiana Michigan Power Company*, case U-11237, order dated November 26, 1996, directing rate collections for SNF fees related to pre-April 1983 nuclear generation by IM Power at its Cook Nuclear Plant to a separate MPSC-regulated external decommissioning trust. The same remedy is appropriate for ratepayer collections undertaken by CECo related to its pre-April 1983 nuclear generation.

70. This remedy is also critically needed to protect ratepayers in view of the weakening condition of the electric industry generally, and of CECo and its parent company, CMS Energy, specifically, and also in view of the substantial financial risks related to SNF disposal. In recent months, CMS Energy's stock and bond ratings have been drastically reduced, its dividend has been cut, and the parent and its utility has been struggling to raise cash resources through asset sales and other steps to reduce crushing multi-billion-dollar debt loads. In any financial restructuring situation such as bankruptcy, the current $137.6 million (plus) represented by these presently internally

held funds collected from ratepayers for SNF disposal would likely be viewed as an unsecured asset. The NRC's Regulatory Guide establishes that an advantage of the establishment of a separate external trust is the better protection of such funds (Guide 1-159, NRC website copy, p 12).

E. <u>Establishment of Decommissioning Trusts To Receive All Ratepayers' Payments of SNF Fees Relative To All Respondent Utilities:</u> The Commission Should Reclassify And Regulate All Other SNF Fee Collections From Ratepayers As Separate External Nuclear Plant Site Decommissioning Trust Funds

71. This proceeding should examine all methods by which respondent nuclear utilities can be required to prospectively transfer funds to separate external MPSC-regulated decommissioning trusts of all funds equivalent to all past, present, and on-going collections from Michigan ratepayers for SNF fees. Directing all said SNF fee collections to external nuclear plant decommissioning trusts would balance and protect the interests of utilities, ratepayers, and the public, because: (1) the ratepayers will have paid, and would continue to pay (with protections), the equivalent cost of the SNF fees relative to the nuclear power the ratepayers use; (2) the funds would be protected and available for ultimate SNF disposal, whether the federal government and the utilities ultimately perform their obligations or, alternatively, if the federal government or utilities, or both, permanently default in their obligations; at the same time, such a protective measure does not affect, or in any way

prevent, the utilities from continuing to pay the SNF fee to DOE under their Standard Contracts; (3) such MPSC regulatory action would recognize that payment of the SNF fees is the responsibility of the respondent utilities as generators and owners of SNF, and that ratepayer coverage of said fee expenses, if any, is subject to MPSC authority and protections; (4) such regulatory action may also encourage Michigan nuclear utilities to more aggressively enforce their Standard Contracts, to uphold the reciprocal statutory and contractual bargain between SNF fee payments and federal SNF disposal, and to seek damages and reimbursement of additional costs and of all fees due to DOE's delay and default; and (5) such a remedy is a critically-needed protection to provide for the enormous financial risk associated with any permanent failure in the federal government's performance of its SNF disposal duties.

72. The Commission's jurisdiction and authority to direct rate collections for SNF fees to separate external trusts, subject to MPSC oversight, is confirmed by the Commission's exercise of such state and NRC-recognized authority to assure the decommissioning of both nuclear plants and SNF sites (paragraphs 19, 22, 60, 68-69, *supra*). The MPSC has exercised its decommissioning authority on a multi-year basis, for all respondent nuclear utilities, commencing with its orders in U-6150 in 1986. The MPSC has also exercised its decommissioning authority with respect to WEPCo and WPSCorp (which serve customers in both Michigan and Wisconsin) on a "cooperative" basis with the Wisconsin Public Service Commission.

73. The decommissioning trusts for ratepayer payments for the SNF fee would be separate, external, interest-bearing trusts administered and regulated pursuant to MPSC orders, in the same manner that present nuclear plant decommissioning funds are administered and regulated by the MPSC. The decommissioning funds for the SNF fee collections (including interest earned) would be subject to release to the nuclear utility or the successor owner of the subject nuclear plants and SNF sites at such time that the SNF is removed to a centralized interim storage facility or a repository.

74. The expansion of the separate external trust concept to include funding of all past, present, and ongoing SNF fee collections by respondent utilities, is also supported by the fact that some utilities are weakening financially, and to ensure better protection and accountability for said funds during a period of continual electric industry restructuring, under which the ownership and responsibility of SNF storage sites or disposal responsibilities may become limited or largely unknown over time.

F. <u>Provision Of Additional Security To Protect Ratepayers And The Public Interest Relative To SNF Storage and Disposal Costs and Risks:</u> The Commission Should Consider The Adoption Of Additional Security, Under The Surety Methods Recognized By The NRC, To Protect Ratepayers And The Public Interest, Including: (A) Requiring Each Nuclear Utility To File A Performance Or Surety Bond; And (B) To Provide

Additional Financial Assurances Such As Obtaining Liability Insurance, Providing A Letter Of Credit, Line Of Credit, Guarantee By A Parent Corporation, Along With The Establishment Of A Standby Trust.

75. In view of the federal default, and until federal or utility performance of SNF disposal is confirmed, the MPSC should utilize its jurisdiction to require respondent utilities to provide additional security and financial assurances to protect Michigan's ratepayers and the public interest, including:

a. **Stockholder-funded Utility Performance or Surety Bond, Funded By Rate Adjustments:** – In addition to the escrowing in decommissioning trusts of SNF fee costs collected from ratepayers, the Commission could also order nuclear utilities to file or fund a stockholder-financed performance or surety bond to assure successful SNF disposal by the utility. This could be in the form either of a bond secured from an insurance company or other entity, or could be funded by each utility on an incremental basis from stockholder funds obtained through rate adjustments, directed to a separate MPSC-regulated bond escrow (the rate adjustment would mean that the contributions by stockholders to this performance bond fund would not be includable in the costs of service for ratemaking purposes). This utility performance bond fund would be required of each utility in their role as a private corporation engaged in the business of generating and selling nuclear power. The bond fund would revert to the stockholders of the utility or its successor owners of

their nuclear plants at such time that the SNF is successfully disposed. The corporate bond could also commit each nuclear utility to the duty and obligation to refund, with interest, all rate collections from ratepayers, for the SNF fees, and all duplicative or increased costs for onsite SNF storage or disposal in the event of a permanent default in the federal SNF disposal program (which could be offset by damage awards successfully obtained by the utility).

b. **Additional Surety Methods, Including Standby Trust, Liability Insurance, Letter Of Credit, Line Of Credit, And Corporate Guarantee:** – The Commission should consider requiring other and additional forms of financial assurance or security, for example, additional liability insurance to protect and indemnify the state's ratepayers, taxpayers, and public interest, including long term economic and environmental impacts, with respect to all aspects of SNF storage or disposal; this may involve inquiring into an expansion or modification of the Price-Anderson Act, the industry's NEIL insurance programs, among other options. Many large companies also engage in self-insurance, whereby reserves or other plans are established to insure the company against various potential liabilities. Similar to the bond remedy, the insurance remedy could be implemented by the purchase of insurance or through a self-funding mechanism to provide for the funding of insurance over time. The Commission has in the past sometimes adopted rate adjustments to effect a sharing of NEIL insurance premiums between ratepayers and stockholders based upon a finding that the insurance benefits shareholders in whole or in part (Commission Order,

U-6923, May 18, 1983, pp 52-54). The Michigan Court of Appeals in *Consumers Power Company v Michigan Public Service Commission*, unpublished opinion dated June 23, 1994, in Docket No. 132898, lv den, 450 Mich 861 (1995), ultimately affirmed the Commission orders excluding a portion of Consumer's Neil II insurance premiums as an operating expense, to effect on sharing between ratepayers and shareholders, stating in part that:

> . . . The mere fact that Consumers was required by federal law to purchase the insurance for its nuclear facilities did not necessarily preclude the PSC from determining that the expense should not be borne by Consumers' ratepayers. Cf., *Detroit v Public Service Comm*, 308 Mich 706; 14 NW2d 784 (1944).

The Commission could make a similar rate adjustment and direct it to a separate fund for a bond or insurance remedy. The Commission at the very least could investigate the kinds of insurance that may exist or could be developed by the industry to cover the SNF disposal situation and to more fully protect ratepayers and the public interest. Any Commission remedy to provide insurance to ensure SNF disposal would also be consistent with NRC regulations devoted to this goal. (paragraph 60, *supra*; also Complaint Exhibit G). The Commission should also inquire into and require other surety protections such as requiring a standby trust, corporate guarantee by a utility's parent company or affiliate, filing of a bank letter of credit, line of credit, verification of financial tests, or other types of assurances recognized by the NRC (paragraph

60; Complaint Exhibit G hereto), or a combination of these assurances.

G. Adoption Of Rate Reductions For All Respondent Utilities Or, Alternatively, Rate Reductions Suspended And Made Subject To Bond And Refund Conditions: The Commission Should Adopt Downward Rate Adjustments For Each Of Respondent Utilities To Match Duplicative SNF Storage And Disposal Costs, Including SNF Fee Costs, In The Event The Commission Does Not Adopt The Above "Collect But Protect" Remedies; Alternatively, The Commission Can Order Rate Reductions Subject To Suspension, Refund, And Bond Conditions.

76. In the event the Commission does not adopt the above "**collect but protect**" remedies to protect ratepayers and the public interest, the Commission should alternatively proceed to order rate reductions for all of respondent utilities equivalent to the amount of duplicative SNF storage and disposal costs which are being incurred, including the SNF fee costs, in view of the federal default in the SNF disposal program. The ratepayers should not simply have to pay, forever, whatever increased or duplicative costs that result from the federal delays and failures, and to face the risk of paying billions more for permanent SNF disposal at the end of each utilities nuclear plant operations. At the very least, the ratepayers should be protected by not paying for amounts that the utilities should collect through damage actions in the U.S.

Court of Federal Claims, or through more aggressive enforcement of their Standard Contract with DOE.

77. The Commission in general rate and Act 304 cases could also adopt a variant of this remedy – to require rate reductions, subject to suspension, refund, and bond conditions, which permit the collection of the costs in rates, but subject to bond requirements, requiring the utility to refund the collections in the event of a failure of SNF disposal or other conditions. The MPSC has, on numerous occasions, conditioned approval of rate collections by utilities upon the requirement that the utility file a bond, which commits the utility to rate refunds depending upon the outcome of the case and the meeting of the bond conditions. For example, the MPSC for many years entertained and granted interim rate relief to utilities, while rate cases were in progress, subject to the filing of a utility bond, to guarantee refunds in the event the amount granted in the Commission's final order was less than that granted as interim rate relief. The courts have affirmed the Commission's fashioning of these bond requirements. [*Attorney General v MPSC*, 63 Mich App 69 (1975); *General Motors Corp v Public Service Commission*, 175 Mich App 584 (1988); *Consumers Power v PSC*, 181 Mich App 261 (1989). *See* also *Michigan Consolidated Gas Co v PSC*, 389 Mich 624 (1973).]. As another example, in *Attorney General v PSC*, 189 Mich App 138 (1991), the Court affirmed the Commission's authorization for CECo to collect $99 million per year for six years for "financial stabilization" purposes, subject also to numerous oversight terms and conditions, including the requirement that the amounts collected would be credited against any potential future authorization of

abandonment losses relating to CECo's failed Midland nuclear plant project. Such an amortization was granted several years later, subject to the conditional credit offset required by the prior order. The latter order authorizing the amortization and enforcing the conditional credit was affirmed in *Attorney General v PSC*, 208 Mich App 248 (1994). Similarly, in *Attorney General v PSC*, 206 Mich App 290 (1994), the Court affirmed a Commission order which ordered a $200 million rate reduction for CECo, but suspended it, and authorized the continuation of existing rate levels subject to the condition that the utility direct the financial resources to added operation and maintenance needs, or to refund the equivalent. A similar bond requirement, or other terms and conditions, could be fashioned with respect to rate collections for SNF fees and costs.

H. <u>Commission Findings Confirming its Jurisdiction:</u> The Commission In Its Order Following Contested Case Procedures Should Affirmatively Declare And Confirm Its Jurisdiction And Authority To Adopt Effective Remedial Actions.

78. The Commission should affirmatively declare and rule in its final order, following contested case procedures, that the MPSC has jurisdiction to review the ratemaking treatment of costs for the SNF fee, and added costs incurred for SNF storage and disposal, by complaint, or upon the Commission's own motion, and also within the context of on-going rate, decommissioning, and Act 304 cases. Complainants request that such rulings be made based upon a full deliberative process following generic contested case

hearings and briefing concerning all legal and factual issues presented

79. The Commission's legal rulings should find, or alternatively be issued in full confidence that, federal law does not preempt, but rather supports, the MPSC's power to exercise its regulatory jurisdiction to effect the remedies requested herein. Under prevailing precedent, a state under our federal system may lawfully determine whether nuclear plants will be located within the state, may limit the economic costs of nuclear power or of nuclear wastes, or may limit the amount of nuclear waste that may be generated or stored within the state, without creating conflicts with federal law. *Pacific Gas and Electric, supra.* The Commission may also investigate the reasonableness of all SNF costs claimed by utilities in their cost of service, and the reasonableness and prudence of utility actions or inactions in incurring SNF costs, for ratemaking purposes. The Commission should therefore affirmatively declare that it has jurisdiction and authority to undertake the rate reviews and to adopt the alternative remedies requested herein. The Commission should find that said state regulatory actions would be fully consistent with both state and federal law, including the NWPA and the provisions and purposes of federal regulations promulgated by the NRC.

IX. CONCLUSION AND RELIEF

Joint Complainants (MEC, PIRGIM, and MCF), pursuant to the statutes, rules, and legal authority cited herein, request ["demand" under Commission Rule 505(1)(e)] that the Commission commence a

formal investigation and contested case proceeding concerning SNF storage, disposal, and fee matters, costs, and rate impacts, relative to all of respondent nuclear utilities subject to its jurisdiction, and to consider and adopt the cumulative protective remedies, requested in this Complaint.

Joint Complainants further request the MPSC to promptly: (1) find that this Complaint constitutes a *prima facie* complaint under the jurisdiction of the Commission justifying the commencement of a generic contested case to fully consider all of the issues and remedies requested herein; (2) to thereafter formally serve said utilities with a copy of this Complaint and to require respondent nuclear utilities to promptly respond to this Complaint; (3) to issue its Notice of Hearing to provide for intervention of interested parties and to adopt a proper schedule for evidentiary hearings and all other contested case procedures as established by the Commission's enabling statutes, MAPA, and the Commission's Rules; and (4) that this case be made subject to the MPSC's electronic and web-site filing procedures, as a major case justifying such public information access.

Joint Complainants request such further procedures in this case to permit the Commission to fully consider the issues and requested remedies to fully protect Michigan's ratepayers and the state's vital public interests, and such further and consistent relief which is lawful and reasonable.

Respectfully submitted,

MICHIGAN ENVIRONMENTAL COUNCIL
PUBLIC INTEREST RESEARCH GROUP
IN MICHIGAN
MICHIGAN CONSUMER FEDERATION

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DATED: March 26, 2003

[Appendix to Complaint omitted in this appendix]

APPENDIX W

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

Case No. U-13771

[Filed March 10, 2005]

In the matter of the formal complaint of the Michigan Environmental Council, Public Interest Research Group In Michigan and Michigan Consumer Federation, for commencement of a generic investigation and contested case, for review and audit of books and records, for establishment of separate additional external nuclear plan site decommissioning trusts, and for adoption of additional ratemaking remedies relating to spent nuclear fuel(SNF)fees and costs collected in rates by nuclear utilities serving Michigan, including Consumers Energy Company, The Detroit Edison Company, Indiana Michigan Power Company, d/b/a American Electric Power, Wisconsin Electric Power Company, and Wisconsin Public Service Corporation.	)

PROPOSAL FOR DECISION

I.

BACKGROUND

A. Procedural History

The complaint in this matter was filed by the Michigan Environmental Council (MEC), the Public Interest Research Group in Michigan (PIRGIM), and the Michigan Consumer Federation (MCF) on March 23, 2003. The complaint named as respondents utilities with nuclear power facilities: Consumers Energy Company (Consumers Energy), the Detroit Edison Company (Detroit Edison), Indiana Michigan Power Company (I&M Power or AEP), Wisconsin Public Service Corporation (WPSC) and Wisconsin Electric Power Company (Wisconsin Electric or WEPCo). By letter from the Executive Secretary, the Respondents were given until May 9, 2003 to file an answer to the complaint. By stipulation of the interested parties, this date was extended to May 30, 2003. In lieu of an answer, pursuant to the Commission's rules of practice and procedure, R 460.17513, the utilities each filed motions to dismiss the complaint. Complainants filed a response to these motions on July 11, 2003. Oral argument on the motions was held on June 23, 2004.

B. History of spent nuclear fuel dispute

The general subject matter of the complaint deals with the past and expected future costs for the storage, transportation and ultimate disposal of spent nuclear fuel, commonly referred to as "SNF". The complaint seeks to invoke the full extent of the Commission's

authority to protect Michigan ratepayers from excessive costs related to spent nuclear fuel in light of the federal government's current default on its statutory and contractual obligation to take the spent fuel for disposal beginning in 1998, and in light of the federal government's alleged potential permanent default on its obligation to provide a repository for spent nuclear fuel disposal. The motions to dismiss raise questions of the scope of the Commission's jurisdiction in an area regulated by the federal government. Some background on the federal and state regulation of spent nuclear fuel disposal, and the general nature of the federal default, is therefore appropriate.

1. Federal regulation

The federal government, under the Atomic Energy Act of 1954, as amended, 42 USC §§ 2011 *et seq.*, licenses and regulates the private generation of nuclear power to protect the public health and safety as well as national security. The Act expresses Congressional policy to promote nuclear power. *See, e.g.*, 42 USC § 2021(a)(1). It provides certain protections from tort liability for operators of licensed nuclear power plants. 42 USC § 2210. It gives the federal regulatory agency "uniquely broad" authority to promulgate regulations and issue orders governing the construction and operation of nuclear power plants. *North Anna Environmental Coalition v United States Nuclear Regulatory Commission*, 533 F2d 655, 662; 174 US App DC 428 (1976); 42 USC §§ 2201(b) and (p). In 1974, this regulatory authority was transferred from the Atomic Energy Commission to the

Nuclear Regulatory Commission (NRC). 42 USC §§ 5801 *et seq*.

In response to the national problem created by the accumulation of spent nuclear fuel and radioactive waste from power plants and other activities such as medical research, Congress passed the Nuclear Waste Policy Act of 1982 (NWPA), signed into law on January 7, 1983. 42 USC §§ 10101 *et seq*. The NWPA expressly recognizes that the federal government is obligated to provide permanent disposal facilities for spent nuclear fuel, but also declares that generators of SNF have primary responsibility to pay for that disposal, and to provide for the interim storage of spent fuel until it is accepted for disposal in accordance with the statute. 42 USC § 10131(a)(4) and (5).

The NWPA establishes the Nuclear Waste Fund and requires the Secretary of the Department of Energy (DOE) to contract with owners and generators of nuclear power for the disposal of spent nuclear fuel. 42 USC § 10222. The Secretary is directed to establish procedures for payment into the Nuclear Waste Fund of the fees provided for in the statute, and to provide for the disposal of spent nuclear fuel by January 31, 1998. In essence, the statute requires and the contracts provide that in exchange for the payment of fees, the DOE will provide for permanent disposal of spent nuclear fuel beginning in 1998:

> [I]n return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear

fuel involved as provided in this subchapter. 42 USC § 10222 (a)(5)(B).

The section further directs the NRC to deny license applications or renewals under sections 2133 or 2134 of the AEA unless the applicants have contracted with the Secretary in accordance with the statute. 42 USC § 10222 (b)(1)(A). Regulations adopted by the DOE established the standard terms of the contracts. 10 CFR § 961.11. The nature and extent of the DOE's statutory and contractual obligations to dispose of spent nuclear fuel beginning that date have been the subject of extensive litigation, discussed in more detail below.

The NWPA makes separate provision for the payment of costs for the disposal of spent nuclear fuel used to generate electricity before and after April 7, 1983, ninety days after the effective date of the act. For all electricity generated after April 7, 1983, the required ongoing fee is 1.0 mill per kilowatt-hour (kWh) of electricity generated.[1] For all spent nuclear fuel generated prior to that date, as directed in the act, the Secretary has determined a one-time fee per kilogram of heavy metal in spent nuclear fuel that would be equivalent to 1.0 mill per kWh for electricity generated by that spent nuclear fuel. 42 USC § 10222

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[1] A "mill" is a thousandth of a U.S. dollar. Published texts of the NWPA use "mil", which generally refers to one-thousandth of a unit of any currency, while most courts and the regulations promulgated under the statute use "mill."

(a)(2) and (3).[2] The Secretary also provided by regulation three alternative payment options for generators to pay the pre-1983 fees. 10 CFR § 961.11[3] The Secretary is required to review the adequacy of the fee periodically and make adjustments where necessary to ensure full cost recovery. 42 USC § 10222(a)(4).[4]

Beginning around 1994, the NRC started to indicate publicly that it would not meet the 1998 statutory and contractual date for accepting spent nuclear fuel.[5] In a suit brought by utilities and state regulatory agencies seeking declaratory relief regarding the DOE's obligations, the U.S. Court of Appeals for the D.C. Circuit held that the DOE was statutorily and contractually obligated to accept spent nuclear fuel beginning January 31, 1998. *Indiana Michigan Power Co v Dep't of Energy*, 88 F3d 1272,

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[2] *See also General Electric Uranium Management Corp v US Dep't of Energy*, 764 F2d 896; 246 US App DC 263 (1985), upholding Secretary's methodology; and *Wisconsin Electric Power Co v Dep't of Energy*, 778 F2d 1; 250 US App DC 128 (1985), holding the fee only applies to power sold by utilities, not to power they consume.

[3] *See* Article VII, Section A, paragraphs 2 and 3; Section B, paragraph 2.

[4] *See also, Alabama Power Co v US Dep't of Energy*, 307 F3d 1300 (CA 11 2002), invalidating the statutory requirement that fee changes receive Congressional approval before taking effect.

[5] *See, e.g. Indiana Michigan Power Co v Dep't of Energy*, 88 F3d 1272, 1274 (CA DC 1996), citing 59 Fed Reg 27,007 (May 25, 1994) and 60 Fed Reg 21,793 (April 28, 1995).

1277; 319 US App DC 209 (1996).[6] Following this decision, however, in 1996, the DOE formally notified the utilities that it would not meet the 1998 deadline. *Northern States Power Co v U.S. Dep't of Energy*, 128 F3d 754, 755, 757; US App DC 20 (1997). In a series of judicial decisions, the federal courts have held that the DOE breached its contractual obligation to provide spent nuclear fuel disposal beginning in 1998. The federal Court of Claims has pending several cases in which utilities are seeking damages for this breach. These damage suits are generally actions for partial breach of contract, although many utilities have asserted claims for unconstitutional taking and illegal exaction as well. *See, e.g. Indiana Michigan Power Co v United States*, 60 Fed Cl 639 (2004); *Consumers Energy Co v United States*, 57 Fed Cl 278 (2003)[7]; *Detroit Edison v United States*, 56 Fed Cl 299 (2003).

2. State regulation

In setting rates for utilities with nuclear power plants, the Commission has generally recognized that the expected future costs of spent nuclear fuel storage and disposal, as with the expected costs associated with the decommissioning of nuclear power plants, should be paid by ratepayers as the power is

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[6] As noted above, there has been some dispute about the nature and extent of the DOE's statutory, as opposed to contractual, obligation to meet this deadline. This is discussed in more detail in section III below.

[7] Consumers Energy has provided a copy of its federal complaint as Attachment B to its motion.

generated, rather than after plant shutdown or fuel removal.

The Commission initiated a case to establish a policy for nuclear decommissioning funding in 1979. *See* October 16, 1979 Order, Case No. U-6150. The Commission's final order approving a settlement agreement in this case was not issued for many years, however, until after amendments to the federal tax code established certain requirements allowing a "qualified nuclear decommissioning trust" to receive favorable tax treatment. *See* August 26, 1986 Order; *see also* 26 USC § 468A. This Commission order required the utilities to establish both a "qualified" and a "non-qualified" nuclear decommissioning trust with reference to this IRS provision, and indicated that the trusts were to be funded through rate surcharges. Spent nuclear fuel storage and disposal costs were not included in this order, presumably because the NWPA had been adopted, and because spent nuclear fuel costs are not included in the NRC definition of decommissioning costs. 10 CFR §§ 50.2; 50.75.[8]

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[8] The NRC requires that nuclear utilities demonstrate financial responsibility for decommissioning, but the NRC does not include as part of decommissioning costs a provision for dealing with spent nuclear fuel remaining at the site at plant shut-down. While spent nuclear fuel must be removed before the site can be returned to unrestricted use, the NRC requires instead that utilities file a spent fuel management plan within 2 years of plant shut down or 5 years prior to license termination. 10 CFR § 50.54(bb). The non-qualified trust, however, may accumulate funds for non-radiological decommissioning activities, as well as for spent fuel management. *See, e.g.* 26 CFR § 1.468A-1. Performance bonds or other financial security are also required to

The Commission has assessed ratepayers for the expected costs of spent nuclear fuel disposal in numerous orders dating back to at least 1978. Prior to this time, it was generally expected that spent nuclear fuel had remaining fuel value that could be could be recycled, but this changed when the Carter administration banned the recycling of spent nuclear fuel. *Town of Concord v FERC*, 955 F2d 67; 293 US App DC 374 (1992). As reflected in the Commission's decision in Case No. U-6923, the Commission approved charges for spent nuclear fuel disposal as part of Consumers Power Company's rates (now Consumers Energy) beginning with its July 31, 1978 Order in Case No. U-5331. *See* May 18, 1983 Order, Case No. U-6923, p. 56. And for I&M Power, spent nuclear fuel disposal costs were included in its fuel adjustment clause in Case No. U-6927, by order of February 17, 1982.

As explained above, the NWPA provided different treatment for spent nuclear fuel generated after April 7, 1983, and before. Payments to the Nuclear Waste Fund for pre-1983 spent nuclear fuel disposal costs were not due until 1985 at the earliest, or a later date depending on the contract option selected. After passage of 1982 PA 304, effective October 13, 1982, and the NWPA, effective April 7, 1983, the Commission generally agreed to treat both the disposal costs for spent nuclear fuel generated prior to April 7, 1983, and the fees imposed for spent nuclear fuel disposal costs on electricity generated after April 7,

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ensure that sites are appropriately decommissioned and returned to unrestricted use.

1983 as PSCR costs, although the costs are accounted for separately.[9] MCL 460.6j(1)(a), added by 1982 PA 304, provides:

> Power supply cost recovery clause" means a clause in the electric rates or rate schedule of a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices.

In Case No. U-7219, initiated prior to the NWPA by an application from I&M Power, the Commission approved a settlement agreement establishing an external trust fund for amounts the company collected from ratepayers for nuclear fuel disposal costs for fuel spent prior to April 7, 1983. (December 20, 1983 Order). The settlement agreement approved by the Commission in this order had been modified from an earlier version to reflect the NWPA, by limiting the external funding mechanism established in the agreement to the pre-1983 costs. The settlement agreement also required the utility in future rate cases to identify the costs of spent nuclear fuel. For Consumers Energy, however, unlike I&M Power, the

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[9] *See, e.g.* Commission Orders in Case No. U-7792 (I&M Power, May 7, 1985 Order) and Case No. U-8286 (Consumers Power, December 17, 1986 Order).

Commission found passage of the Act obviated the question of an external funding mechanism. See May 18, 1983 Order, Case No. U-6923, p. 57.

Subsequently, the Commission has made some adjustments in the ratemaking treatment of pre-1983 spent nuclear fuel disposal costs, but has continued to authorize collection of fees for post-1983 costs in PSCR factors. In Case No. U-11237 (November 26, 1996 Order), I&M Power was granted permission to recover pre-1983 spent nuclear fuel costs in base rates, with a requirement that any excess collections be deposited in the company's non-qualified decommissioning trust fund, established following Case No. U-6150.

As noted above, the standard contract for spent fuel disposal with the DOE gave each utility three options for payment for pre-1983 SNF disposal fees. In Case No. U-9346, the Commission found that Consumers Power had reasonably selected the deferred payment option under its contract with the DOE, and changed the amortization amount it had previously established to allow the utility to collect the increased costs, including interest costs, associated with its selection of that option. *See* May 7, 1991 Order, p. 12. The Commission has also distinguished between costs of SNF disposal recoverable under Act 304, and storage costs such as the cost of dry cask storage that are to be recovered in base rates. See *Re Wisconsin Electric Power Co*, Case No. U-12615 (November 20, 2001 Order).

As discussed in the complaint, motions and response, the Commission has continued to allow the utilities to recover costs computed in accordance with

the NWPA, notwithstanding the failure by the federal government to meet the 1998 deadline for spent nuclear fuel disposal. The MPSC was a plaintiff in both *Indiana Michigan Power Co v Dep't of Energy*, supra, and *Northern States Power Co v U.S. Dep't of Energy*, supra, in which the Commission along with other states and utilities sought to redress the DOE's failure to provide for the timely disposal of spent nuclear fuel. Following the Court's decision in *Indiana Michigan Power Co v Dep't of Energy*, the Commission initiated its own inquiry into the potential problems and responses to the federal government's delay in accepting spent nuclear fuel for disposal. (January 28, 1997 Order, Case No. U-11314). As the Commission explained in that order:

> The continuing delay in the schedule for the federal government to take the waste exacerbates the cost and funding problem. In addition to the costs of the original on-site nuclear power plant waste storage facilities (designed storage) and the payments made into the NWF, there are significant costs associated with 1) adding more storage capacity, 2) early retirement of operating power plants caused, in part, by waste disposal problems, 3) replacement power, 4) the need for long-term monitoring and provision of security related to storage sites, and 5) increased complexity in decommissioning plants. As the payments continue into the NWF with little measurable progress toward the goal of long-term storage for SNF and HLW, there is a very real concern that the federal government will eventually permanently renege on its commitment to take

possession of the nuclear waste and that all of the money paid into the NWF will have been lost. Such a scenario would place the technical and financial responsibility for disposing of SNF and HLW onto the utilities and the states.

Currently, highly radioactive SNF and HLW sit in storage at each of the five nuclear reactors in the state of Michigan. **The costs of storage and the implications of a failed federal program are combining to make this an issue with immediate and critical implications for the ratepayers, taxpayers, and utilities of the state of Michigan.** [*Id.* at p. 6 (emphasis added)]

The investigation initiated by the Commission focused on the following questions "designed to address legal and policy issues surrounding the federal government's failure to perform, including the propriety of continuing ratepayer and utility payments into the NWF":

1. Given the federal government's lack of progress and inefficient management of the civilian radioactive waste program, and assurance by the DOE that it will not obey the court's order to comply with the provisions of the NWPA (i.e., begin removing nuclear waste by January 31, 1998), what can the Commission do, consistent with Michigan law, to protect the interests of Michigan's ratepayers?

2. Would federal law prevent the Commission from taking actions, such as the suspension of

ratepayer payments to the utilities for the NWF, to protect the interests of Michigan ratepayers? If the Commission can and should suspend ratepayer payments to the utilities, should the suspension be whole or partial?

3. Can and should the Commission order the utilities to place into an escrow account the payments that would otherwise be made into the NWF? If an escrow account is established, how and by whom should it be administered?

4. If the Commission suspends ratepayer payments for the NWF, or if the Commission orders the utilities to establish escrow funds for the NWF payments, should the utilities continue to make scheduled NWF payments to the federal government?

5. If ratepayer payments are suspended, what conditions (e.g., waste program milestones) would justify a restoration of payments to the NWF?

6. If payments into the NWF are suspended, what are the risks to the utilities? For example, would the nuclear plant operating licenses issued by the Nuclear Regulatory Commission be in jeopardy? Would the utilities be at risk of losing their place in the queue for having the federal government accept the waste? Under what provisions of the NWPA or other federal laws or DOE, NRC, or other federal regulations could such actions occur?

7. How can continuing utility payments to the NWF beyond the date of breach of contract (i.e., January 31, 1998 or another date) be justified given DOE's promised failure to meet the terms of the NWPA and the standard contracts?

8. What efforts have utilities made to encourage or require the DOE to fulfill its obligations relative to the disposition of SNF and HLW? Have any of these efforts been successful? What future efforts are planned?

9. Given the DOE's and the federal government's continued failure to resolve the problems with the program and take possession of the waste, what, if any, alternatives should be considered by the utilities for protecting the financial interests of their customers and seeking the removal of SNF and HLW from utility plant sites?

10. If a federal repository is not available to begin taking waste until 2015, how much more will it cost for utilities to continue to store the waste at the plant sites, including the costs of adding storage capacity? [*Id.* at pp. 7-8]

The Commission closed this investigation on December 4, 2000 without further findings.

Since then, as discussed above, the utilities have filed claims against the United States Department of Energy seeking damages caused by the government's failure to accept spent nuclear fuel by the 1998 deadline. As explained in the legal briefs of the parties,

the Complainants in this case have attempted (unsuccessfully) to raise largely the same issues presented in their complaint in other Commission proceedings. As the Commission explained in its decision in Wisconsin Electric Power Company's 2001 PSCR plan case proceeding, Case No. U-12615:

> Undoubtedly, the waste disposal issues confronting Wisconsin Electric and the nuclear industry as a whole are significant, and a solution will not be implemented in accordance with the DOE's contractual timetable. However, the Commission finds that the MEC/PIRGIM's proposals are not necessary to correct any showing of an unreasonable or imprudent action or omission on the part of Wisconsin Electric's management that adversely affects the rates paid by PSCR customers. *See* order dated August 16, 2001, Case No. U-12614, at 4. The problem is larger than Wisconsin Electric's nuclear operation, feasible alternatives to the DOE's construction of a permanent repository are not readily apparent, and the Commission is unable to find that Wisconsin Electric has been imprudent. Moreover, the MEC/PIRGIM's remedial proposals are beyond the scope of a PSCR proceeding. [November 20, 2001 Order, pp. 15-16]

See also, e.g. *Re Wisconsin Electric Power Co*, September 16 2002 Order, Case No. U-12725, pp. 30-31 (rate case); and *Re Wisconsin Public Service Corp*, November 20, 2001 Order, Case No. U-12613 (PSCR case). The Michigan Court of Appeals upheld the Commission's decisions in at least three of these

cases. *Michigan Environmental Council v Wisconsin Electric Power Co*, Michigan Court of Appeals Docket Nos. 244354, 246744 (May 11, 2004); *Michigan Environmental Council v MPSC*, Michigan Court of Appeals Docket Nos. 240403, 240406 (December 9, 2003). In Case No. U-13688, WPSC's rate application, the parties entered into a settlement agreement that addressed this complaint proceeding:

> This settlement is entered into without any party waiving any factual or legal issue, or remedy, relating to the costs or rate impacts of Spent Nuclear Fuel ("SNF) fees, storage, or disposal, or nuclear plant operation, maintenance, or plant and SNF site decommissioning. Without waiving any issue or argument, the parties will pursue or refer said issues to the generic complaint case initiated by MEC et al., in MPSC Case No. U-13771. The agreement in this paragraph is for this case only and shall not be cited or viewed as precedent or be binding on any party hereto in any other case. [July 23, 2003 Order, Settlement agreement, paragraph 8] Recently, in Case No. U-13808, Detroit Edison's rate application, the Commission noted the pendancy of this proceeding. (November 23, 2004 Order, p. 120).

C. Complaint

The complaint is entitled: "Formal Complaint for Commencement of a Generic Investigation and Contested Case, for Review and Audit of Books and Records, for Establishment of Separate Additional

External Nuclear Plant Site Decommissioning Trusts, and for Adoption of Additional Ratemaking Remedies Relating to Spent Nuclear Fuel (SNF) Fees and Costs Collected in Rates by Nuclear Utilities Serving Michigan." Background factual and legal allegations are set forth in the first four counts. The complaint chronicles the history of the federal government's enforcement of the NWPA and the MPSC's decisions regarding spent nuclear fuel costs. Count III contains allegations regarding the Commission's jurisdiction to act on the complaint, citing provisions of the Public Service Commission Act, 1939 PA 3, MCL 460.6 *et seq.*; the Public Utilities Commission Act, 1919 PA 410, MCL 460.54 *et seq.*; the Electric Transmission Act, 1909 PA 106, MCL 460.551 *et seq.*; the Railroad Commission Act, 1909 PA 300, MCL 462.2 *et seq.*; and the Michigan Administrative Procedures Act, MCL 462.2 *et seq.*; as well as provisions of federal law. Count IV contains general allegations regarding the risk of permanent default by the federal government on its obligations to dispose of spent nuclear fuel.

The remaining counts are focused on general allegations regarding Respondents' rates and practices and requested relief. Count V in general terms alleges that the utilities' rates are unreasonable. Count VI in general terms alleges that the utilities' actions, practices and omissions have been unreasonable and imprudent. Count VII contends that the Commission must "investigate, regulate and adopt effective remedies" with regard to SNF costs. The complaint seeks a range of remedies, as reflected in the title, including a generic investigation of the past and expected future costs of SNF, rate proceedings, escrow requirements and reporting obligations.

The introduction to the complaint summarizes the claims presented as follows:

> This case has become necessary because: (1) respondent utilities' rates and charges are unjust, unreasonable, and improper because they shift all increasing, duplicative, and substantial SNF fee, storage, and disposal costs and financial risks to ratepayers, contrary to state and federal law; (2) Michigan's ratepayers and important public interests have been rendered legally insecure, due to the actions, practices, and omissions of respondent nuclear utilities, and (3) this Commission's failure or refusal thus far to review and address the compelling SNF costs issues is unlawful, unreasonable, and improper, justifying a renewed and vigorous formal review of SNF cost and rate issues by the Commission.
>
> Complainants and their citizen members are directly harmed and prejudiced by the current unacceptable situation. Michigan ratepayers have paid and are paying hundreds of millions of dollars for SNF fees for a federal SNF disposal program which is in default and which may never dispose SNF, and for a host of increasing and duplicative costs for respondent utilities to store SNF for much longer periods than contemplated. Michigan ratepayers are also shouldering the multi-billion dollar risk of disposing SNF when and if the utilities and the federal government permanently default in their SNF disposal duties and obligations. Compelling reasons also exist, derived from

> both long-term experience and recent events with the federal SNF disposal program, to conclude that there is an increasing and alarming risk that the federal government may never ultimately dispose of respondent utilities' SNF. [Complaint, p. 2]

Characterization of this complaint is critical to an ultimate determination how to proceed in this case. On the one hand, the complaint bears elements of a formal complaint seeking specific relief from the utilities in that it alleges that their rates are unreasonable and that their treatment of spent nuclear fuel costs and cost-recovery alternatives are unreasonable, and in that it seeks a "contested case." On the other hand, the principal focus of the complaint is the invocation of investigative powers by the Commission. The title of the complaint, Count VII of the complaint, and the requested remedies all call for investigation by the Commission. As quoted above, the requested remedies are broad-ranging, but temporally and logically the investigation by the Commission comes first and would be the *sine qua non* of the remaining remedies. Paragraphs 61 and 62 of the complaint pose questions that would be answered in an investigation. These paragraphs, along with the framing of the complaint, indicate that Complainants are not prepared to present testimony or other evidence definitively answering the questions presented, but are asking the Commission to investigate, seek answers and act on whatever it finds. As explained in more detail below, the factual allegations in the complaint are of a general, conclusory nature, not rising to the level of detail required of formal complaints under the

Commission's rules of practice and procedure, R 460.17505.

The relief sought in the complaint can thus best be described as a request or "petition" asking that the Commission use the full extent of its authority, beginning with its investigative powers, to protect the ratepayers from present and future (unnecessary or duplicative) costs associated with spent nuclear fuel. As counsel for the Complainants explained during hearings on the motions to dismiss:

> The Commission could make this into the opening generic investigation in a comprehensive sense, to be followed by implementation on an ongoing basis in rate cases, PSCR cases as they occur, or decommissioning cases, which deal with the more specific facts of each utility and each situation, or alternatively, the Commission could take a look at all these remedies and say, "Yes, we are going to commence a separate generic proceeding to fully investigate this in sort of a two-stage process."
>
> The Commission could also grant our complaint and also on its own motion start a generic investigation and make it a joint docket. In other words, in the past I've seen the Commission deny a perfectly good complaint and then in its companion order say, The Commission opens this investigation on its own motion. Well, I think the commission could do both. You don't necessarily have to deny a complaint to have a proceeding on your own

> motion. You could actually combine them, or you could take them, you know, one, two order fashion.
>
> But, if the Commission gets interested in this issue, and we believe they should, the Commission, if it started an investigation on its own motion, can offer certain advantages in the sense that there's widespread notice, other parties may intervene that are ratepayers, there may be more parties that would be able to input on this process, and the burden of proof would be a little bit less onerous for the complainants. [Tr. 108-110]

The significance of this distinction between a petition and a complaint will be addressed further below, in discussing the motions to dismiss and recommending disposition of this matter.

D. Motions to dismiss

In response to the complaint, the utilities filed motions to dismiss, citing the recent Commission decisions in Case Nos. U-12613, U-12615, and U-12725, discussed above, and challenging Complainants' standing as well as the Commission's jurisdiction over the subject matter of the complaint, and asserting that the complaint fails to state a prima facie case and fails to conform to the Commission's rules of practice and procedure. Rule 513 of the Commission's rules of practice and procedure governs motions to dismiss and defenses:

> A defense that the complainant is without standing to make the complaint, that the commission lacks jurisdiction over the subject matter of the complaint, or that the complaint fails to state a prima facie case or otherwise fails to conform to these rules may be raised by motion to dismiss or answer, at the option of the respondent. All other defenses to a complaint shall be raised by the answer.

The standing arguments are discussed in section II below. Section III discusses subject matter jurisdiction, addressing Respondents' arguments that the Commission lacks jurisdiction over the subject matter of the complaint because of federal pre-emption. Section IV addresses the Commission's state law authority to grant the relief requested, including arguments based on the Michigan Supreme Court's decision in *Union Carbide Corp v Public Service Com'n*, 431 Mich 135; 428 NW 2d 322 (1988). Section V discusses the arguments that the complaint fails to state a prima facie claim or otherwise fails to conform to the Commission's rules of practice and procedure by failing to make sufficient factual allegations to support relief. Section VI addresses I&M Power's motion for nonjoinder.

Disposition of the motions to dismiss depends in significant part on how the complaint is characterized. To the extent the complaint is treated as a petition addressed to the Commission's discretion, it is not clear that the Complainants need to meet any particular standing threshold, and the jurisdictional issues can be considered further by the Commission in the context of any action it might choose to take. For

purposes of this ruling, however, I will attempt to address the principal arguments raised in the motions to dismiss, essentially treating the complaint as a formal complaint under the Commission's rules of practice and procedure. Because this ruling recommends dismissal of the complaint, it is issued as a Proposal for Decision.

II.

STANDING

Standing is an often-elusive concept that functions primarily to ensure that parties to a dispute have a sufficient interest in the outcome to litigate the matter vigorously, and thus assist the tribunal to reach the correct result under an adversarial system of dispute resolution. Rules 501 through 515 of the Commission's rules of practice and procedure set forth the basic requirements for bringing a complaint. *See* R 460.17501- 460.17515. These rules require that a complaint be made by a person "having an interest in the subject matter of the complaint"[10]:

> A complaint may be formal or informal and may be made by a person having an interest in the subject matter of the complaint or may be made

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[10] Consumers Energy's motion seems to acknowledge that the parties have an interest in the subject matter, but distinguishes this from standing: "Consumers Energy does not question that Complainants have sincerely held beliefs. However, a party may have an interest in the subject matter of an issue, and not be sufficiently legally aggrieved for purposes of establishing standing." (Motion, p. 5, paragraph 10)

by the commission on its own motion or by the staff, subject to applicable statutory standards. R 460.17501

The Commission has generally required parties initiating or seeking to intervene in an action to meet a "two-prong test", showing both an actual injury and that they are within the zone of interests protected by the statute. The Commission borrowed this test from the 1970 United States Supreme Court decision, *Association of Data Processing Service Organizations, Inc v Camp*, 397 US 150, 90 S Ct 827, 25 L Ed 2d 184 (1970) ("*ADAPSO*").

In proceedings before the Commission, application of this two-prong test is generally considered discretionary, especially in the context of intervention. As noted above, Rule 501 only requires that the complainant have an interest in the subject matter of the complaint. Some statutory provisions also appear to confer standing on certain persons to initiate action before the Commission. Complainants refer to this in their response as "statutory standing." The complaint provisions of the Railroad Commission Act, 1909 PA 300, MCL 460.22 provide that complaints challenging utility rates or practices[11] may be brought by "any person, firm or corporation or association, or any mercantile, agriculture or manufacturing society, or any body politic or municipal organization." MCL 462.22(b) expressly provides that proof of actual

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[11] Respondents also challenge whether the complaint challenges rates or practices of the utility within the meaning of the complaint statutes. These arguments are addressed below.

damages is not required. MCL 462.24 allows any person to petition the Commission to alter or rescind a prior order. And the complaint provisions of the Electric Transmission Act, 1909 PA 106, MCL 460.557, provide that complaints may be brought by "a consumer or a city, or a village, or a township." MCL 460.22 permits the Commission to investigate a complaint brought under the statute; MCL 460.557 requires the Commission to investigate any complaint brought under the statute. Complainants cite these statutory provisions in bringing their complaint, along with other statutory provisions as set forth in paragraphs 12 through 16 of the complaint.

Since the Commission adopted the two-prong *ADAPSO* test, federal courts have further developed the concept of standing as required for federal courts by the "case or controversy" limitation in Article III of the U.S. Constitution. *See, e.g. Lujan v Defenders of Wildlife*, 504 US 555, 112 S Ct 2130; 119 L Ed 2d 351 (1992) ("*Lujan*"). The Commission has not adopted these subsequent formulations of a test for standing, relying on the two-prong test in deciding standing disputes as recently as its July 22, 2004 decision in Case No. U-14031. *See also*, February 12, 2004 Order, Case No. U-13874. Note that while the federal courts have refined the test for standing under Article III, the federal courts have recognized numerous interests, beyond traditional property or contract rights, as sufficient to confer standing. As the Court explained in the *ADAPSO* case:

> The 'legal interest' test goes to the merits. The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the

> question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Thus the Administrative Procedure Act grants standing to a person 'aggrieved by agency action within the meaning of a relevant statute.' That interest, at times, may reflect 'aesthetic, conservational, and recreational' as well as economic values. A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause. We mention these noneconomic values to emphasize that standing may stem from them as well as from the economic injury in which petitioners rely here. [*Id.*, 397 US at 153-4 (citations omitted)]

While customer status ordinarily constitutes sufficient standing to challenge the rates and practices of the utilities, Consumers Energy, Detroit Edison and I&M Power challenge the Complainants' standing to bring the instant complaint under a variety of theories, claiming that Complainants have failed to establish that they represent ratepayer interests, and do not meet the Commission's traditional test for standing. The companies also argue that the Commission should impose additional standing requirements, based on *Lujan,* and the Michigan Supreme Court's recent decision in *Lee v Macomb Cty Bd of Com'rs*, 464 Mich 726; 629 NW2d 900 (2001) ("*Lee*"). Respondent utilities assert that Complainants fail to meet the requirements of the standing tests articulated by the courts in these decisions.

One of the arguments the utilities raise in the context of standing is the claim that the Complainants are in reality seeking relief from the federal government, through the elimination of the spent nuclear fuel disposal fee, relief which is outside the Commission's authority. As discussed in more detail below, this argument is primarily a challenge to the Commission's jurisdiction and it is addressed along with the utilities' other arguments regarding the Commission's jurisdiction to grant relief in section IV below. The argument that Complainants cannot represent ratepayer interests in this proceeding is discussed in section A below; section B addresses the traditional two-prong test; and section C addresses the utilities' arguments for an extension of the traditional two-prong test.

A. Representational Standing

As explained above, Complainants bring their petition on behalf of themselves and their members, as ratepayers and customers of the utility. A threshold question raised by the utilities' motions is whether the Complainants have standing to maintain an action asserting "ratepayer" or "customer" interests.

Consumers Energy and I&M Power argue that Complainants have failed to establish that they or their members are customers of Consumers Energy or I&M Power. In response to these claims as set forth in the utilities' motions, the Complainants provided affidavits to establish that the organizations themselves are utility customers and that the organizations do have members who are customers of

the utilities. (Complainants' Response to Motions to Dismiss, Attachment B).

As explained in the complaint and in the Affidavit of James Clift, the Michigan Environmental Council (MEC) is an umbrella group whose members are themselves organizations involved in public interest issues. PIRGIM, for example, is a member of MEC. Mr. Clift's affidavit identifies specific members of the MEC in the service territories of the utilities. Mr. Clift's affidavit states that he has verified that MEC member organizations have members who are citizen ratepayers within the utilities' service areas. The affidavit provides names of some specific customers for each utility. The Michigan Consumer Federation (MCF) is a state-wide non-profit consumer advocacy organization, whose purposes include the representation of consumer and economic interests of its member. The affidavit of Richard Gamber on behalf of the MCF clearly states that the MCF has members who purchase electricity from Consumers Energy, Detroit Edison and I&M Power. (Affidavit, paragraph 3). PIRGIM is described as a state-wide non-profit consumer protection and public interest organization. The affidavit of Brian Imus on behalf of PIRGIM does not identify specific members who are customers of the utilities challenging standing, but does indicate that it has 95 to 6970 members in each of the utilities' service territories.

Because the affidavits were filed with Complainants' response to the motions to dismiss, the utilities' primary opportunity to respond to the affidavits was at oral argument. Only I&M Power argued that the affidavits fail to establish that the

members who reside in the service territory of I&M Power are actually customers of the utility. (Tr. 60). The Affidavit of Mr. Imus could be viewed as ambiguous on this point, and Mr. Clift's affidavit names only an individual member of an MEC member organization, also a member of the board of directors, who is a customer of I&M Power. Mr. Gamber's affidavit is explicit, however, that MCF "has members who live in the service territory of Indiana Michigan Power Company and purchase electricity from it." (Gamber Affidavit, paragraph 3). This affidavit adequately resolves any ambiguity and the Complainants have established for purposes of a standing motion that they have members who are customers of the respondent utilities.

Ordinarily it is sufficient for ratepayer groups appearing before the Commission to establish that they have members who are customers of the relevant utility.[12] I&M Power, however, argues that this alone is insufficient and that the Complainants must establish that they have been expressly authorized by specific ratepayers to represent those ratepayers in this proceeding. I&M Power Brief, pp. 5-7; Tr. 61.

In *Friends of the Earth v Laidlaw*, 528 US 167; 120 S Ct 693; 145 L Ed 2d 610 (2000)("*Friends of the Earth*"), the Supreme Court explained that even under the strict test for standing in federal judicial proceedings, an association has standing to bring suit

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[12] This is consistent with Act 304 and other statutory provisions that recognize that ratepayers are likely to be represented by citizen groups.

on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Id.*, 528 US at 180-181, citing *Hunt v Washington State Apple Advertising Com'n*, 432 US 333, 343; 97 S Ct 2434; 53 L Ed 2d 383 (1977).

I&M Power instead argues for a more restrictive test. It cites *Drake v Detroit Edison*, 453 F Supp 1123 (WD Mich 1978)("*Drake*") for the proposition that the Complainants must assert "personal injuries" and not the injuries of third parties.[13] The *Drake* case, however, did not involve an association's standing to represent its members, but instead presented the question whether members of cooperatives could bring an action challenging the legality under the Atomic Energy Act of a loan agreement between the cooperative and a nuclear utility. The Court ruled that the cooperative members had alleged actual injury as ratepayers of the cooperative, since they would bear the ultimate costs associated with the loan, but held that the economic interests they asserted did not fall within the zone of interests protected under the Act. This case does not conflict with the principles set forth in *Friends of the Earth*, which directly address associational standing.

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[13] I&M Power views this requirement as a part of the "injury-in-fact" prong of the traditional test for standing, but it is appropriate to address all questions regarding associational or representational standing prior to resolving the other standing claims raised by the Respondents.

I&M Power also cites two older Commission decisions to support its contention that express representation of specific ratepayers is required. Citing the Commission's November 25, 1980 decision in Case No. U-5407, I&M Power argues:

> The Commission determined that PIRGIM failed to provide sufficient legal evidence to support its intervention requested because it did not present specific information concerning customers/ members residing within the service territories of the utility. Likewise, in this proceeding, MEC, *et al.* have failed to show that they represent any specific customer of [I&M Power], nor is there any indication that any specific [I&M Power] customer desires such representation by MEC, et al., or is willing to be bound by MEC, et al.'s actions in this matter. [Brief, p. 7]

The Commission's decision in Case No. U-5407 does not require a more rigorous test for standing in this case than articulated in *Friends of the Earth*. As I&M Power candidly acknowledges, Case No. U-5407 was a securities issuance proceeding, and the Commission addressed the requirements for intervention under a particular statute, 1909 PA 144, now repealed by 1995 PA 246. Under former MCL 460.301:

> Any interested person, including but not limited to municipalities and organizations whose membership consists of a substantial number of ratepayers within the service area of the utility, shall have the right to intervene in accordance with the rules of the Commission.

The Commission thus required PIRGIM either to show that it had a "substantial number of ratepayers within the service area of the utility", *or* to show that it was representing a specific customer or group of customers. *See* June 10, 1980 Order, Case No. U-5407. Moreover, in the November 25, 1980 order cited by I&M Power, the question was also presented whether PIRGIM could represent ratepayers in a security proceeding for a cooperative, given that the ratepayers were members of the cooperative and thus presumptively represented by the cooperative itself. The requirement that PIRGIM show that it represented a specific customer served to allow it an opportunity to refute the presumption that the customers were adequately represented by the cooperative.

Finally, I&M Power cites the Commission's January 18, 1983 decision in Case No. U-7117, a rate case in which the Commission upheld the ALJ's ruling limiting ABATE's intervention to representation of ABATE members who were customers of the respondent utility. The Commission pointed out that this limitation in no way foreclosed ABATE from fully litigating the case. This decision has apparently not been relied on by the Commission in the intervening 20 years. I have not found another subsequent case in which ABATE's participation was expressly limited.

For these reasons, I conclude that the more appropriate test for representational standing, consistent with the Commission's traditional acceptance of citizen groups as ratepayer representatives, is that set forth in *Friends of the Earth*. After reviewing the complaint and the supporting affidavits discussed above, I conclude that

the Complainants meet this standard for representing ratepayers of the utilities.

Complainants have numerous times brought or intervened in proceedings before the Commission, and their representational standing has been explicitly or implicitly established. PIRGIM and MCF (through the Residential Ratepayer's Consortium) have been longstanding participants in MPSC cases. PIRGIM intervened in utility rate cases before the Commission as early as 1975. See, *e.g.* Case Nos. U-4807 (February 9, 1976 Order) and U-4840 (May 10, 1976 Order). PIRGIM was one of the petitioners responsible for initiating Case No. U-6150, in which the Commission held a generic hearing to consider funding for decommissioning of the utilities' nuclear power plants. *See, e.g.* October 16, 1979 Order. All three Complainants have been parties to more recent Commission cases in which they advocated essentially the same concerns they raise in their complaint. *See, e.g.* Case No. U-12615, discussed above. Paragraph 6 of the complaint also identifies numerous cases in which Complainants participated.

Consistent with *Friends of the Earth*, the affidavits also establish that Complainants are advocacy organizations formed in part for the purpose of advocating positions in regulatory and legal forums, and that their positions in this proceeding have been duly authorized in accordance with their organizational requirements. (Clift Affidavit, paragraph 8; Gamber Affidavit, paragraph 5; Imus Affidavit, paragraph 6). Note that ratepayer interests can be diverse, as recognized in Act 304, MCL 460.6l and 460.6m. Respondents have not claimed that the

participation of any individual ratepayer is necessary to assist the Commission to resolve this matter, and I do not find that such participation would be helpful.

Thus, Complainants have standing as representatives of utility customers to maintain an action before the Commission. Based on this conclusion, it is necessary to address Respondents' remaining arguments that the Complainants lack standing, even as ratepayers, because they do not meet the two-prong test for standing discussed above, and because more onerous standing requirements should be imposed consistent with those recently adopted by the federal courts for standing before judicial bodies.

B. Two-prong test

As noted above, the two-prong test has been adopted by the Commission as the general test for standing both to initiate and to intervene in actions. The Complainants maintain that they meet the requirements of the two-prong test. Complainants as customer representatives challenging the rates and practices of the utility also arguably have statutory standing to maintain a complaint under MCL 460.557 and MCL 460.22. Respondents instead argue that Complainants have established neither injury in fact nor that their complaint is within the zone of interests protected by the Commission's regulatory statutes.

1. Injury In Fact

The utilities argue that Complainants have failed to meet the first prong of the traditional test for standing by failing to allege actual injury:

> Complainants make allegations of a potential harm that are both (i) speculative and (ii) are based on events that have not yet occurred. They do not allege a specific "injury in fact" claimed to have been caused by Consumers Energy. [Consumers Energy Brief, p. 10]

Consumers Energy cites cases in which the Commission declined to permit intervention based on allegations of a "conjectural possibility of future harm." (Consumers Energy Brief, p. 10). Detroit Edison also argues that the claim is predicated on the "speculative supposition" that the DOE "may" default in its SNF obligations in the future, and argues that this lacks the essential "injury in fact" required for standing. (Detroit Edison Brief, p. 22). In response to the claim that the injuries alleged in the complaint are speculative, the Complainants argue:

> The complaint is directed to the actions and inactions of the utilities, and to the unreasonable rates of the utilities, and to the continued generation by them of SNF while they shift all costs and financial risks of same to ratepayers; and in the process, by passing through increasing and duplicative costs while seeking to escape the sharing of any cost, risks or responsibility for SNF. [Complainants' Brief, p. 80]

In reviewing the complaint, I conclude that the Complainants have alleged actual injury. The first allegation of injury is set forth in the introduction to the Complaint, p. 2:

> Complainants and their citizen members are directly harmed and prejudiced by the current unacceptable situation. Michigan ratepayers have paid and are paying hundreds of millions of dollars for SNF fees for a federal SNF disposal program which is in default and which may never dispose SNF, and for a host of increasing and duplicative costs for respondent utilities to store SNF for much longer periods than contemplated.

Paragraph 41 alleges that present rates are unjust and unreasonable:

> The rates of respondent nuclear utilities are unjust and unreasonable because they include broad categories of duplicative and escalating SNF storage and disposal costs (and financial risks) for: (i) the on-going federal SNF fees for a federal program which has been in default since 1998 and may never dispose SNF, and which has experienced a failure in the direct statutory and contractual quid pro quo or bargain between the payment of SNF fees in exchange for federal SNF disposal commencing on January 31, 1998; (ii) substantial incremental costs incurred by utilities to provide for SNF storage for longer periods than contemplated due to the default in the federal program; these include costs to develop additional SNF storage in pools and dry storage facilities at utility plant sites, and associated costs for ongoing long-term operation, maintenance, monitoring, and provision of security; (iii) increased nuclear plant decommissioning costs due to the presence

> of SNF on-site at the end of the plant's operational life for longer periods and in larger amounts than was anticipated at the time the plants were designed and constructed; and (iv) the insurmountable costs for SNF disposal if the utilities and the federal government never fulfill their obligations, which are unknown but could be comparable to or greater than DOE's present estimated costs of $59 billion for the program.

The injuries alleged in this paragraph, as well as in paragraphs 46 and 48, constitute the traditional ratepayer injury. Complainants' rate claims are based both on fees presently paid under the NWPA, and alleged "duplicative" costs presently included in rates for SNF storage and handling. The continued generation of spent nuclear fuel at an alleged excessive cost is also a present as opposed to future injury.[14] A standing challenge is not the place to resolve the merits of a dispute. It would not be appropriate, for example, to attempt to determine whether a utility's

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[14] The Commission has recognized the legitimacy of arguments based on intergenerational equity as a basis for present rate determinations in numerous cases and contexts. *See, e.g. Re Consumers Energy Co.*, Case No. U-12999 (October 14, 2004 Order); *Re Consumers Power Co.*, Case No. U-7830 (March 29, 1985 Order). Since the Commission recognized the importance of planning for the long-term decommissioning of nuclear power plants, it is hard to claim that ratepayer interest in the accuracy of such plans is too speculative to support standing. In Case No. U-6150, the agreement approved by the Commission permits any party to assert that the decommissioning provisions should be modified. Such arguments may be raised by ratepayers although they may result in present rates being higher rather than lower.

rates are in fact too high before deciding whether a complainant has standing to challenge those rates. Likewise, it is not appropriate to determine in this case whether Complainants claims regarding the necessity for SNF fee payments and duplicative storage costs are meritorious to resolve Complainants' standing to raise those claims.

Contrary to Detroit Edison's analysis, I do not find that the complaint is predicated on a permanent or "speculative" default by the federal government. As explained above, the complaint alleges that rates are presently unjust and unreasonable, and such an argument does not turn on a finding that the federal government will permanently default on its obligations to dispose of spent nuclear fuel. While the Complainants assert that the utilities and the Commission should plan for such a contingency, the complaint is also predicated on the federal government's failure to meet the 1998 deadline for spent nuclear fuel disposal, and on the claim that the utility is incurring (and charging ratepayers for) duplicative costs for spent nuclear fuel storage. There seems to be no dispute that the federal government will not begin accepting spent nuclear fuel until at least 2010.

Consumers Energy argues that claims based on pending federal civil actions for breach of contract are speculative; that until any money is received, there is no actual injury. Again, one of the key allegations underlying Complainants' complaint is that the utilities are incurring duplicative costs; in seeking to recover such costs from the federal government, the utilities presumably do not believe their claims for

such compensation are speculative. The relief sought to redress this duplicate cost, *e.g.* rate reductions or accounting treatment for any recovery, would not appear to be so speculative as to fail to meet the injury in fact prong, but is consistent with the injury in fact recognized in *Drake*, supra. Respondents seem to assert that an attempt to credit ratepayers for any recovery would constitute retroactive ratemaking once the funds become the property of the utility.[15] In *Bennett v Spears*, the Supreme Court found the requisite "injury in fact" to allow ranchers to challenge a biological opinion of the U.S. Fish and Wildlife Service under the Endangered Species Act, where the ranchers alleged that the Bureau of Reclamation, would follow the biological opinion, reducing the amount of water available to be allocated to the ranchers:

> Given petitioners' allegations that the amount of available water will be reduced that they will be adversely affected thereby, it is easy to presume specific facts under which petitioners will be injured—for example, the Bureau's distribution of the reduction pro rata among its customers. [*Id.*, 520 US 154, 168; 117 S Ct 1154; 137 L Ed 2d 281 (1997)]

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[15] *But see* Tr. 18 and 53; and Detroit Edison's Brief at p. 9 ("If DOE repudiates its contractual obligations entirely, the appropriate protection for ratepayers would be for Edison to seek relief from DOE under the contract, including refund of all amounts previously paid. . . ")

The injury-in-fact prong has not been considered particularly onerous, and has even been described as "an identifiable trifle." *See, e.g. Interfaith Community Organization v Honeywell*, --- F.3d ----, 2005 WL 387606 (CA 3 2005), citing *United States v Students Challenging Regulatory Agency Procedures*, 412 US 669, 690 n14, 93 S Ct 2405, 37 L Ed 2d 254 (1973). Thus, I conclude that Complainants have alleged the requisite injury in fact.

2. Zone of Interest

Consumers Energy characterizes Complainants' interest as an interest in having Consumers Energy breach its obligations under federal law. Consumers Energy argues that:

> There is no statutory basis by which the Commission can force the federal government to live up to its obligations in a complaint case before the MPSC. Nor is there any way that the Commission can lawfully direct Consumers Energy or other utilities to breach their obligations under federal law. The interests raised in the Complaint are not those that can be protected or regulated under the statutes cited by Complainants. [Brief, p. 11]

Detroit Edison likewise argues that the Complainants do not meet the zone of interest prong because the essence of the complaint involves inaction by the DOE, a federal agency outside the Commission's supervision or jurisdiction. (Brief, p. 22). In Detroit Edison's view, the complaint must be brought in federal court. Detroit Edison and I&M Power cite the federal court's

determination in *Roedler v Dep't of Energy*, 255 F3d 1347 (CA Fed 2001)("*Roedler II*"), to support their argument that Complainants do not satisfy the zone of interest prong, relying on the Court's conclusion that ratepayers are not third-party beneficiaries of the contracts between the utilities and the DOE and thus could not bring an action to enforce those contracts, or bring an action for an unconstitutional taking.

The complaint expressly requests only such relief as the Commission has jurisdiction to grant. Complainants clearly do not agree that they are asking the utilities to breach their obligations under federal law, but claim instead they are trying to protect ratepayers; rather than forcing the federal government to live up to its obligations, the Complainants argue that they are only seeking traditional ratepayer remedies to encourage the utilities to enforce their rights under federal law. While it is appropriate for the utilities to argue that the Commission has no jurisdiction to grant the relief requested, as addressed in the jurisdictional discussion below, this is not an argument that the Complainants lack standing. The Complainants allege harm to their legally protected interest in utility rates and practices. Moreover, the complaint seeks relief in addition to escrow of the SNF fees, so a determination of the Complainants' motivation for seeking this particular form of relief cannot resolve the question whether the interests they assert are within the zone of interest protected by the Commission's regulatory statutes.

Finally, the U.S. Court of Appeals decision in *Roedler II*, supra, is not persuasive on the question of whether the injuries alleged in the complaint are

within the zone of interests protected under the Commission's regulatory statutes. In this case, as explained above, the federal court determined that the NWPA did not make ratepayers third-party beneficiaries of the contracts between the utilities and DOE. But this determination is similar to the Court's determination in *Drake*, discussed in section 1 above. More significantly, the Complainants are not seeking relief from the federal government under the contract; they are seeking relief from the Commission under its regulatory jurisdiction. Consistent with this distinction, in the district court case under review in *Roedler II*, the district court's holding limited the ratepayers to their remedies before the state regulatory agency, finding that the Minnesota Public Utilities Commission was responsible for setting the plaintiffs' rates. *Roedler v U.S. Dep't of Energy*, unpublished opinion of the United States District Court for the District of Minnesota, 1999 WL 1627346 (December 23, 1999)(Docket No. CIV 98-1843(DWF/AJB)) ("*Roedler I*"). The Court of Appeals in *Roedler II* affirmed the district court decision that the ratepayers lacked standing to maintain the breach of contract action, and declined to address the district court's determination that it could not interfere with the rates established by the Minnesota PUC.

Based on the allegations in the complaint, I conclude the interests asserted are arguably within the zone of interest protected by the Commission's regulatory statutes.

D. Constitutional "standing" doctrine under *Lee* and *Lujan*

Citing the United States Supreme Court decision *in Lujan v Defenders of Wildlife*, 504 US 555; 112 S Ct 2130, 119 L Ed 2d 351 (1992), and the Michigan Supreme Court's decision in *Lee v Macomb County Bd of Com'rs*, 464 Mich 726; 629 NW 2d 900 (2001), Consumers Energy and I&M Power argue that the Commission's two-prong test should be revised. In *Lujan*, the United States Supreme Court articulated a test for standing to challenge the actions of the federal government in enforcing provisions of the Endangered Species Act.

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "'injury in fact"–an invasion of a legally protected interest which is (a) concrete and particularized. . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly trace[able] to the challenged action of the defendant, and non. . . th[e] result [of] the independent action of some third party not before the court." [*Id.*, 504 US at 560 (citations omitted)]

In *Lee*, the Michigan Supreme Court held that a citizen lacked standing to challenge a county's decision not to contribute to a certain fund, endorsing the test articulated in *Lujan* and the description of it as the

"irreducible constitutional minimum". *Lee*, 464 Mich at 740. In reliance on these decisions, the utilities argue that Complainants lack standing because it is not likely that their injury can be redressed by a favorable ruling, because the injury is not fairly traceable to Respondents' conduct, and because they are not asserting a "particularized injury", an injury distinct from the citizenry at large.

Complainants argue, and I concur, that the standing tests articulated in these decisions do not apply to the Michigan Public Service Commission's implementation of its regulatory authority under statutes enacted by the Legislature. Instead, a review of the decisions makes clear that the courts intended to recognize or establish limits on the authority of the judicial branch, in order to avoid undue interference with the legislative and executive branches of government. As the Court in *Lujan* explained:

> To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," and to become "'virtually continuing monitors of the wisdom and soundness of Executive action.'" We have

> always rejected that vision of our role. [*Id.*, 504 US at 577, footnotes and citations omitted]

There is no "irreducible constitutional minimum" requirement for bringing a complaint before an executive branch agency. Instead, the extent to which a person has a right or merely an opportunity to be heard by the Commission is determined by the specific regulatory statutes defining the scope of the Commission's authority, the rules promulgated by the agency and the nature of the interests asserted. Thus, as explained above, some statutes require the Commission to act on complaints without regard to actual injury. *See, e.g. Champion's Auto Ferry, Inc v MPSC*, 231 Mich App 699, 711; 588 NW2d 153 (1998) in which the Court held that the municipality had standing to challenge the rates and practices of the ferry company under MCL 460.204:

> By its terms, the statute allows any juridical entity, such as the township, to file a complaint with the PSC (as successor to the Public Utilities Commission), and it there upon becomes the duty of the PSC to investigate. The statute does not prescribe how such investigation shall be conducted.

Accord, Michigan Bell Telephone Co v PSC, 214 Mich App 1 (1995), where the Court held that a party bringing enforcement action and seeking fines and penalties must meet the Commission's traditional test for standing, including "injury in fact", but did not rest its decision on a constitutional footing, and was presumably interpreting the Michigan Telecommunications Act. *See also, Southeastern*

Michigan Fair Budget Coalition v Kileen, 153 Mich App 370, 380; 395 N.W.2d 325 (1986) ("[T]he Legislature can do anything which it is not prohibited from doing by the people through the federal and state constitutions.")

No principle of standing articulated by the Court in the *Lee* case prevented plaintiff Lee from petitioning the county for redress of his grievances by asking the county board of commissioners to levy the necessary tax to endow the veterans' relief fund. In fact, the Court emphasized that the plaintiffs had not sought relief from the county board of commissioners before initiating suit in the circuit court. The Michigan Constitution, Const. 1963, Art. I, § 3, guarantees citizens the right to petition the government for redress of grievances, notwithstanding that they may allege injuries no different from the citizenry at large. Since the courts are not policy making bodies, these petitions are most often properly addressed to the legislature and to the executive branch of government.

As the Court majority commented on the significance of a constitutional limit on judicial action, in *National Wildlife Federation v Cleveland Cliffs Iron Co.*, 471 Mich 608, 615-616; 684 NW2d 800 (2004) (emphasis added):

> Absent a "particularized" injury, there would be little that would stand in the way of the judicial branch becoming intertwined in every matter of public debate. If a taxpayer, for example, opposed the closing of a tax "loophole" by the Legislature, the legislation might be challenged in court. If a taxpayer opposed an expenditure

for a public building, that, too, might be challenged in court. If a citizen disagreed with the manner in which agriculture officials were administering farm programs, or transportation officials' highway programs, or social services officials' welfare programs, those might all be challenged in court. If a citizen opposed new prison disciplinary policies, that might be challenged in court.

In each instance, **the result would be to have the judicial branch of government--the least politically accountable of the branches--deciding public policy, not in response to a real dispute in which a plaintiff had suffered a distinct and personal harm, but in response to a lawsuit from a citizen who had simply not prevailed in the representative processes of government. To allow the judiciary to carry out its responsibilities in this manner is to misperceive the "judicial power," and to establish the judicial branch as a forum for giving parties who were unsuccessful in the legislative and executive processes simply another chance to prevail.** To allow this authority in the judiciary would also be to establish the judicial branch as first among equals, being permitted to monitor and supervise the other branches, and effectively possessing a generalized commission to evaluate and second-guess the wisdom of their policies. As the United States Supreme Court observed in [*Massachusetts v*

Mellon, 262 US 447, 487-489; 31 S Ct 250; 55 Led 246 (1911)]:

> The administration of any statute . . . is essentially a matter of public and not of individual concern . . . . The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with the people generally.... To [allow standing under a different understanding] would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which we plainly do not possess.

Even applying the *Lujan* and *Lee* tests, however, Complainants argue that they meet these tests and have standing to pursue their complaint before the Commission. A brief analysis is therefore appropriate.

1. Likelihood injury can be redressed

To the extent the Complainants seek relief within the Commission's authority to award, and their complaint purports to seek only such relief, they have essentially by definition met the prong of the federal standing test that requires a likelihood the injury will be redressed by a favorable decision. That is, the

Complainants have tailored their complaint so that they claim an injury from inaction by the Commission. Thus, Complainants argue that it is likely as opposed to speculative that the injury will be redressed by a favorable decision, because a major purpose of the requested relief is "to have the Commission get a handle on these issues." (Brief, p. 80). Respondents' arguments that Complainants' injury cannot be redressed by a favorable decision repeats the claim, rejected above, that they are seeking relief from the federal government. In all other respects, Respondents' argument can be reduced to the question whether the complaint states a claim on which relief can be granted, a question which is addressed in sections III, IV and V below. I therefore find that for purposes of standing, it is likely that the injury alleged can be redressed by a favorable ruling.

2. Injury traceable to the conduct of Respondents

Similarly, Respondents argue that the injury is not "traceable" to their conduct because the source of Complainants' injury is the action of DOE. As explained above, however, Complainants allege that the rates and practices of the Respondent utilities are unreasonable, and these allegations are in part based on the utilities' response to the federal default. One could always argue that the Commission, rather than Respondent utilities, is directly responsible for the Respondents' rates, but that argument leads to obviously absurd results. Thus, I find that Complainants allege injuries fairly traceable to Respondents' conduct.

3. Injury distinct from citizenry at large

I&M Power focuses on the Complainants' assertions that they are "insecure" due to the potential federal failure to establish a repository, and characterizes this as a claim shared by the citizenry at large. (Brief, p. 6). Consumers Energy joins this argument. I&M Power also cites in support of its claim *Saginaw Fire Fighters Assoc v Police and Fire Dept Civil Service Com'n*, 71 Mich App 240; 247 NW2d 365 (1976), in which the Court of Appeals applied the traditional judicial limitation on taxpayer standing to prevent union members from challenging testing of nonresidents for positions within the fire department, recognizing that the union members did not allege any employment-related injury from the testing, but sought to enforce a local residency requirement only as members of the public.

Complainants respond, and I agree, that they are alleging an injury that is distinct from the citizenry at large by alleging they are currently paying excessive amounts, not as taxpayers, but as ratepayers. (Brief, p. 84). Ratepayer injuries may be broadly shared among millions of utility customers in the State, but that does not diminish the legally cognizable nature of the injury.

Respondents' focus on Complainants' arguments that the relief they seek should motivate the federal government to perform, to show Complainants are asserting injuries shared with the public at large. This focus ignores the gravamen of the complaint. In essence, Respondents confuse standing requirements to bring an action seeking relief (in this case a

ratepayer challenge to utility rates) with the arguments that a party may make on the merits. Even in judicial proceedings, once a party has standing, there is no further bar to the party advancing arguments the party perceives to be in the public interest. Thus, in *Bennett v Spears*, supra, the Supreme Court acknowledged the important role played by "private Attorneys General" in the enforcement of the Endangered Species Act, although these parties must meet the judicial test for standing. And the "public interest" is a critical factor courts consider in determining whether injunctive relief is warranted. Of course, the Commission considers the public interest in carrying out its regulatory responsibilities.

Accordingly, while I recommend that the Commission specifically reject the utilities' argument that standing before the Commission necessarily requires a showing that an actual injury is "distinct from the injury" suffered by the citizenry at large, I find that the Complainants have alleged such a distinct injury in this matter.

D. Discretionary standing

As discussed above, Complainants assert they have "statutory standing" pursuant to several commission statutes, including section 7 of 1909 PA 106, 460.551; sections 6 and 6a of 1939 PA 3, MCL 460.6 and 6a, as well as section f of PSC Act and section 4 of PUC Act, 460.4 and 460.54. (Brief, p. 87-89). The rate and service complaint statutes are worded broadly. I find that Complainants have "statutory standing" to bring a complaint under 460.557 and 462.22, but this does

not entitle the Complainants to a contested case hearing. See, e.g. *Champion's Auto Ferry,* supra. Since it is discretionary with the Commission whether to hold a contested case hearing under these statutes, it is appropriate to require that Complainants comply with the Commission's rules of practice and procedure.

E. Conclusion

Based on the arguments of the parties and the affidavits submitted, and for the reasons set forth more fully below, I conclude the Complainants have standing to bring a complaint challenging the rates and accounting practices of the utilities and seeking a commission investigation of the expected costs of spent nuclear fuel disposal. Complainants meet the traditional two-prong test for standing. While Complainants appear to meet other judicial tests for standing, such tests are not applicable in Commission proceedings. Because I conclude that Complaints meet the traditional two-prong test for standing, I decline to make a recommendation to the Commission whether discretionary standing is appropriate.

III.

SUBJECT MATTER JURISDICTION

Respondents broadly assert that the Commission lacks jurisdiction to consider issues raised by Complainants, arguing the Commission's jurisdiction to review nuclear waste handling, storage and disposal costs is pre-empted by the AEA and the NWPA. In its motion, Consumers Energy asserts:

> SNF storage, disposal and fees are regulated by federal law. Any jurisdiction that the MPSC might otherwise have had over matters related to SNF fees, payments of such fees, SNF storage, or SNF disposal have been preempted by federal law. Congressional intent would be frustrated by the relief sought by Complainants. [Motion, p. 5]

Detroit Edison argues:

> Since the essence of the Complaint involves the claimed inaction of the DOE, a federal agency outside the Commission's supervision or jurisdiction, the Commission cannot resolve Complainants' asserted claims. The Complaint must instead be brought, if at all, in the appropriate federal forum. [Brief, p. 22]

The company characterizes the NWPA as a comprehensive scheme, and argues: "There is no element of discretion—if you own a nuclear plant, the NWPA specifies what must be done." (Brief, p. 8). I&M Power argues that there is no "dual authority" with respect to nuclear waste management. (Brief, p. 12). The Complainants dispute this claim, arguing that "neither Congress nor any federal agency has pre-empted the economic regulation of nuclear power or SNF costs by states or their regulatory commissions." (Brief, p. 44).

Under the U.S. Constitution, all state regulation within a field is pre-empted if Congress intended federal law to occupy the entire field. State laws are also pre-empted if they directly conflict with federal

law, either because compliance with both state and federal law is not possible or because the state law frustrates achievement of Congressional intent. The former is often referred to as "field pre-emption" and the latter is often referred to as "conflict pre-emption."

It is well-established that the NRC has exclusive jurisdiction over the safety and operation of nuclear power plants, including regulations to provide for the safe handling, storage and disposal of spent nuclear fuel[16]. *Pacific Gas & Electric Co v State Energy Resources Conservation & Development Com'n*, 461 US 190; 103 S Ct 1713; 75 L Ed 2d 752 (1983) ("*Pacific Gas*"); *English v General Electric*, 496 US 72; 110 S Ct 2270; 110 L Ed 2d 65 (1990). Although the full pre-emptive effect of the NWPA has not been conclusively determined by the federal courts, neither the AEA nor NWPA have been held to preclude all state economic regulation of nuclear power production costs, decommissioning costs or spent nuclear fuel storage and disposal costs.

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[16] Under the NWPA, as amended, some responsibilities with regard to the repository for SNF disposal are assigned to other agencies. DOE has responsibilities for contracting with nuclear power generators for spent nuclear fuel disposal and for the designing and operation of a repository for the permanent disposal of spent nuclear fuel; EPA has responsibilities to establish generally applicable standards to protect the environment from releases of radioactive materials; NRC is responsible for the licensing of the repository. *See Nuclear Energy Institute, Inc v EPA*, 373 F3d 1251, 1259; 362 US App DC 204 (2004). The NWPA also promotes generators' use of on site storage, but licensing of SNF storage operations is essentially done under the AEA. See 42 USC §10154.

In *Pacific Gas*, the Court found that the AEA and NWPA did not pre-empt a California statute that imposed a moratorium on nuclear plan construction until a disposal plan was in place for nuclear waste including spent nuclear fuel. The Court found because California's purpose was to protect the public from the potential economic cost of nuclear power, rather than regulating the safety or operation of nuclear power plants, it did not conflict with the federal regulatory scheme. Although the Court recognized Congressional policy underlying the AEA to promote nuclear power, the Court held that the AEA was not intended to promote nuclear power "at all costs" but "only that it proceed consistent with other priorities and subject to controls traditionally exercised by the states and expressly preserved by the federal statute." *Id.* at 200. The Court recognized that reservation language in the AEA saves traditional economic regulation for the states. *See* 42 USC §§ 2018, 2021(k). But the Court also looked to the provisions of the NWPA, not expressly covered by the language of these sections and found that these also did not pre-empt economic regulation by California:

> While the passage of this new legislation may convince state authorities that there is now a sufficient federal commitment to fuel storage and waste disposal that licensing of nuclear reactors may resume, and, indeed, this seems to be one of the purposes of the Act, it does not appear that Congress intended to make that decision for the states through this legislation. Senator McClure attempted to do precisely that with an amendment to the Senate bill providing that the Act satisfied any legal requirements for

> the existence of an approved technology and facilities for disposal of spent fuel and high-level nuclear waste. The amendment was adopted by the Senate without debate. During subsequent House hearings, it was strongly urged that this language be omitted so as not to affect this case. The bill which emerged from the House Committee did omit the Senate language, and its manager, Rep. Ottinger, stated to the House that the language was deleted "to insure that there be no preemption." The bill ultimately signed into law followed the House language. While we are correctly reluctant to draw inferences from the failure of Congress to act, it would, in this case, appear improper for us to give a reading to the Act that Congress considered and rejected. Moreover, it is certainly possible to interpret the Act as directed at solving the nuclear waste disposal problem for existing reactors without necessarily encouraging or requiring that future plant construction be undertaken. [*Id.*, 461 US at 219-220, citations and footnotes omitted]

While the California regulation at issue in *Pacific Gas* focused on a determination whether nuclear power should be permitted at all, no court has interpreted the pre-emptive effects of the NWPA to preclude all state regulatory commission inquiry into the area of spent fuel handling, storage and disposal costs. Instead, although Detroit Edison argues that subject matter jurisdiction over the complaint lies with the federal courts, at least one court has clearly disclaimed such jurisdiction, and concluded *inter alia* that under the filed rate doctrine it lacked the

authority to review rate determinations made by the Minnesota PUC, and that primary jurisdiction rested with the Minnesota PUC. See, *Roedler I, supra*. The Court distinguished the benefits granted and obligations placed on nuclear power owners and generators from the interests of ratepayers, who are not even mentioned in the Act:

> [N]ot only is the NSP Standard Contract itself lacking in any mention of ratepayers such as the Plaintiffs, but the statute and regulations in question are similarly devoid of any reference to ratepayers as an intended beneficiary. Instead, the NSP Standard Contract and the NWPA, with its accompanying regulations, refer only to intended obligations and benefits between DOE and the owners and generators of spent nuclear fuel, and to an intention to benefit and protect the general public welfare and the environment. [*Id.* 1999 WL 1627346 at 5.][17]

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[17] The Court's decision does not overturn the ordinary presumption that utility costs would be passed on to ratepayers. *See, e.g. Florida Power & Light Co v Westinghouse Electric Corp*, 826 F2d 239 (CA 4 1987). Respondents cite the Court's statement in this case that Congress intended that storage costs would be borne by ratepayers. This case presented the question whether Westinghouse had a legal excuse for failure to perform its contractual commitment to dispose of spent fuel generated by the Florida utility. The Court found the parties contemplated reprocessing of the spent fuel, which became impossible, and equity indicated that the costs of storage and disposal should be borne by the utility ratepayers in accordance with Congressional expectation in the NWPA. But the Court's decision in this case did not suggest that state review was entirely pre-empted, as it

Consumers Energy and I&M Power attempt to distinguish the *Pacific Gas* holding by arguing that the NWPA regulates all aspects of spent nuclear waste storage and disposal, and thus pre-empts the entire field including economic regulation. Consumers Energy cites 10 CFR § 50.54(bb), arguing that the requirement for adequate assurance of funds for decommissioning pre-empts the Commission's economic regulation. (Brief, p. 14). I&M Power argues that 42 USC §§ 7133(8) and 10101 establish complete field pre-emption, but does not discuss the text of these sections in detail. (Brief, p. 12). What these arguments overlook is that, while the NWPA does promote the use of on-site storage to store spent nuclear fuel prior to disposal, the licensing and regulation of storage facilities, whether included within a utility's operating license for its nuclear reactor or for independent spent fuel storage installations, is essentially governed by the NRC pursuant to the AEA, which preserves state economic regulation as discussed in Pacific Gas. *See, e.g.* 42 USC §10154 (referring to licensing under section 189 of the AEA, 42 USC 2239); 42 USC §7133 ("except that nothing in this section shall be construed as granting to the Department regulatory functions presently within the Nuclear Regulatory Commission").

That the NWPA does not pre-empt entirely the MPSC's exercise of jurisdiction over everything

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clearly recognized ratesetting authority in the state commission: "In reaching this conclusion, we are aware that in all probability Florida [Power & Light] will be permitted to recover its costs from its ratepayers." *Id.* at 279.

connected to spent nuclear fuel is also consistent with the Commission's prior assertions of jurisdiction with regard to spent nuclear fuel storage and disposal costs. The Commission has recognized that it has not only the authority but responsibility to ensure that funds are available for decommissioning, for example. As discussed above, in Case No. U-7219, the Commission approved a settlement agreement requiring I&M Power to establish an external funding mechanism for amounts collected for pre-1983 spent nuclear fuel disposal costs. The Commission order in that case indicated that the Commission "specifically reserves jurisdiction of the matters herein contained and the authority to issue such further order or orders as the facts and circumstances may require." (December 20, 1983 Order, p. 4). In Case U-7792, I&M's 1984 PSCR plan case, ABATE objected to a proposal for decision that would have allowed the spent nuclear fuel disposal costs to be reviewed less frequently than the annual PSCR proceedings. The Commission agreed with ABATE's objection and held: "While it is difficult for the Commission to see the eventuality which would require such costs to be disallowed since they are set by federal statute or DOE, nevertheless they must be reviewed yearly and ABATE's exception is well taken." (May 7, 1985 Order, p. 14). In 1991, the Commission reviewed Consumers Energy's choice of payment options under the DOE contract, finding it reasonable for Consumers Energy to defer pre-1983 cost payments to the Nuclear Waste Fund by selecting "Option 2", § B.2 of Article VIII of the standard contract, in light of the utility's existing financial condition at the time, which the Commission characterized as "near bankruptcy" and other constraints on the utility's expenditures. Case No. U-9346, May 7, 1991 Order. In

Case No. U-11314, the Commission initiated an inquiry into the impact on Michigan utilities of the federal default, as explained above in section I.[18]

As the Court explained in *Pacific Gas*, in areas such as rate and service regulation traditionally left to the States, the presumption is that Congress did not intend to displace this traditional regulation. In evaluating the intent of Congress to completely occupy a field, courts also look to whether there are obvious gaps in the regulatory scheme. The NWPA contains no federal mechanism by which spent nuclear fuel storage and disposal costs are reviewed for reasonableness and prudence and seemingly no federal forum for utility ratepayers to assert their interests in paying only reasonable and prudently incurred costs.

In light of the Court's holding in *Pacific Gas*, and prior Commission decisions, I conclude that Congress did not intend to displace all traditional state economic regulation of utilities that might relate to spent nuclear fuel costs, but instead the pre-emptive effects of the NWPA must be judged by evaluating specific proposed state regulations in light of the purposes and requirements of the NWPA. As the Supreme Court has explained:

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[18] Other state commissions have also looked at spent nuclear fuel costs. See, e.g., *Re Florida Power & Light*, 1995 WL 762239, 6 (Fla PSC Dec 12, 1995)("We will continue to review these amounts in future decommissioning studies in order to determine the prudence of their inclusion."); *Re Carolina Power & Light*, 2002 WL 31256453 (NCUC Sept 11, 2002); *Re Portland General Electric*, 160 PUR4th 201 (Or PUC, March 29, 1995).

Even when Congress has not chosen to occupy a particular field, pre-emption may occur to the extent that state and federal law actually conflict. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," . . . or when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. [*Wisconsin Public Intervenor v Mortier*, 501 US 597, 605; 111 S Ct 2476; 115 L Ed 2d 532 (1991) (citations omitted)]

The purposes of the NWPA are set forth in the Act:

(1) to establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and such spent nuclear fuel as may be disposed of in a repository;

(2) to establish the Federal responsibility, and a definite Federal policy, for the disposal of such waste and spent fuel;

(3) to define the relationship between the Federal Government and the State governments with respect to the disposal of such waste and spent fuel; and

(4) to establish a Nuclear Waste Fund, composed of payments made by the generators and owners of such waste and spent fuel, that

> will ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel. 42 USC § 10131(b)

None of the pre-emption arguments presented in the motions address the purposes or the text of the NWPA or the AEA, to explain how any of the specific remedies conflict with the goals or requirements of these acts.[19] This is a difficult task, however, at least in significant part due to the broad range of remedies sought by Complainants and the generalized nature of the factual allegations in the complaint. At a minimum, the investigatory, accounting and reporting remedies requested by Complainants do not appear to even arguably conflict with either the purposes or provisions of the NWPA or the AEA. For example, Commission inquiry into the costs of spent nuclear fuel handling, storage and disposal costs would appear to be a necessary corollary to the Commission's rate setting function, even if Respondents are correct that

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[19] Regulation of the storage of spent nuclear fuel is within the jurisdiction of the NRC, primarily under the auspices of the AEA, although the NWPA establishes that operators and generators are responsible for providing and paying the costs of storage prior to disposal in accordance with the act. 42 USC §§ 10131(a)(5), 10154. Consumers Energy cites the NRC requirement that utilities provide assurance of funding for management of spent nuclear fuel, but does not articulate how this translates into a conflict with Commission jurisdiction in this case (Brief, p. 14 n4); Complainants respond that 10 CFR 50.75 and 72.30 recognize a state role that is applicable to SNF storage sites as well as the licensed reactor sites. (Brief, p. 52)

those functions are simply ministerial, *i.e.* to evaluate whether the spent nuclear fuel costs are "federally mandated", and to provide appropriate funding for spent nuclear fuel storage, including costs that will be incurred at the time of plant decommissioning.[20] Nothing in the NWPA appears to address how any damages recovered in breach of contract actions should be treated, or to preclude external funding of monies to pay pre-1983 liabilities when they become due, and no policy of the act appears to conflict with state regulations prescribing such treatment or funding.

Courts evaluating the breach of contract claims brought by the utilities have recognized that the utilities have at least some independent decision making authority with regard to spent nuclear fuel management. In *Tennessee Valley Authority v United States*, 60 Fed Cl 665, 674 (2004), the Court recognized that the utilities that entered into contracts with the DOE were obligated to take actions to minimize their losses in light of the DOE's expected (and now ongoing) nonperformance, thus supporting Complainants' contention that there is at least some role for state regulatory agencies to ensure that the utilities have taken action to minimize their losses.

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[20] Complainants cite 67 Fed Reg 78332, adopting nuclear decommissioning trust provisions for nuclear power plants no longer regulated by state utility commissions. The NRC indicates that "the rule continues to give State commissions the flexibility that they need to ensure the adequacy of decommissioning funds while protecting consumers within their jurisdiction." *Id.* at 78343

Whether the utilities' expenditures are motivated solely by federal law or by independent business reasons clearly is a proper subject for Commission inquiry. Highlighting this distinction, in *Indiana Michigan Power Co v United States*, 60 Fed Cl 639 (2004), the Court found that Indiana Michigan failed to establish damages because its expenditures were motivated not by the DOE's breach of its disposal deadline, but by independent business reasons. *See also Yankee Atomic Electric Co v United States*, 2004 WL 1535688, 1, unpublished decision of the U.S. Court of Federal Claims (June 28, 2004, Docket No. 98-126C). In *Yankee Atomic Electric*, it appears that the plaintiff nuclear utilities Maine Yankee Atomic Power and Connecticut Yankee Power stopped paying ongoing spent nuclear fuel disposal fees following the DOE's breach. *Id.*, 2004 WL 1535688, 3. These cases refute Respondents' contentions that the NWPA mandates all actions the utilities are to take. Again, as explained above, the Commission has looked at various components of SNF storage and disposal costs on numerous occasions and made provision as it deemed appropriate. FERC in carrying out its rate setting responsibilities has also not disclaimed jurisdiction to review storage and disposal costs. *Town of Concord*, *supra*, 955 F2d 67 (1992).

The Respondents principally rely on a line of cases invoking the "filed rate doctrine" in arguing that federal supremacy requires that all "federally mandated" costs incurred by the utilities be passed on to ratepayers to avoid "trapping" these costs, including the spent nuclear fuel disposal fees and all other costs associated with the handling and storage of spent nuclear fuel. *See, e.g.*, Detroit Edison Brief, p.10. The

filed rate doctrine in its broadest form provides that a regulated entity cannot deviate in any way from rates and tariffs approved or filed with a regulatory agency, state or federal. *See, e.g.*, *Richardson v Standard Guaranty Ins Co*, 853 A2d 955; 371 NJ Super 449 (2004); *American Telephone & Telegraph Co v Central Office Telephone, Inc.*, 524 US 214; 118 S Ct 1956; 141 L Ed 2d 222 (1998). *See also*, the district court opinion in *Roedler I, supra*. In the cases relied on by Respondents, courts have extended this generic doctrine to preclude state regulatory agencies from disallowing in retail rates the costs of wholesale power or interstate natural gas services regulated by the FERC under the Federal Power Act and the Natural Gas Act. The most recent U.S. Supreme Court decision explained:

> The filed rate doctrine requires "that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates. . . When the filed rate doctrine applies to state regulators, it does so a matter of federal pre-emption through the Supremacy clause." *Entergy Louisiana, Inc v Louisiana Public Service Com'n*, 539 US 39; 123 S Ct 2050, 156 L Ed 2d 34 (2003).

The "filed rate doctrine" is a relatively narrow doctrine that has not been applied as such beyond the FERC rate setting arena to effectuate Congressional intent regarding the division of responsibility for rate setting between FERC and the states. In reaching the conclusion that Congress intended to pre-empt state prudency reviews of the costs underlying FERC rates

and tariffs, the Court found that Congress gave the FERC the authority to review the reasonableness and prudence of those rates and tariffs to protect ratepayers. *See, e.g., Nantahala Power & Light Co v Thornburg*, 476 US 953, 963-964; 106 S Ct 2349; 90 L Ed 2d 943 (1986); 16 USC §§ 824d, 824e(a).

Even under the filed-rate-doctrine line of cases, however, all state agency consideration of a retail utility's obligation to pay FERC-regulated costs is not precluded. Courts have recognized that states still retain the obligation to set retail rates. *See, e.g. Nantahala*, supra. States can reject costs incurred by a utility even under a FERC-approved tariff if it finds, for example, that the utility imprudently selected among alternative suppliers. See, e.g., *Pike County Light & Power Co v Pennsylvania PUC*, 465 A2d 735; (Pa 1983); *Kansas-Nebraska Natural Gas Co v State Corporation Com'n*, 610 P2d 121 (Kan 1980), cited in *Nantahala*, supra, 476 US at 972 ("Without deciding this issue, we may assume that a particular quantity of power procured by a utility from a particular source could be deemed unreasonably excessive if lower cost power is available elsewhere, even though the higher cost power actually purchased is obtained at a FERC approved, and therefore reasonable, price."); *Kentucky West Virginia Gas Co v Pennsylvania PUC*, 650 F Supp 659 (Pa 1986); *aff'd* 837 F2d 600 (3d Cir 1988); *City of New Orleans v New Orleans PSC*, 911 F2d 993 (CA 5 1990).

Aside from the nuclear waste disposal fees, which are specified in the contracts and may be modified by the DOE, no party has cited any DOE or NRC cost determination that could be given preclusive or

pre-emptive effect under the filed rate doctrine, although as discussed below, the complaint itself does not detail the SNF-related costs at issue for each utility. The complaint does allege, however, that these costs are duplicative, and that the utilities are seeking and are entitled to damages to cover these costs. Moreover, because the complaint (and the motions) do not characterize the non-fee costs in any detail, it is not possible to determine whether the allegedly "duplicative" costs are costs associated with spent nuclear fuel generated in prior years, or to be generated in future years. Unlike the circumstances presented in the typically filed rate cases cited by Respondents, it is not clear that the costs at issue would otherwise meet the definition of current operating expense, or what the appropriate accounting treatment would otherwise be for these costs. *See, e.g., Town of Concord v FERC*, 955 F2d 67; 293 US App DC 374 (1992) (FERC assumed jurisdiction to review question of how spent nuclear fuel costs should be treated in rates). *See also, Office of Consumer Advocate v Iowa State Commerce Com'n*, 428 NW2d 302, 306 (Iowa 1988), where the Iowa Supreme Court upheld the state commission's decision to pass pre-1983 costs to current ratepayers as "unexpected, extraordinary costs". In Michigan, too, there was a question whether the pre-1983 fees could be treated as a cost of fuel recoverable under Act 304, indicating that the Commission's decision to include those costs in PSCR factors was discretionary. *See, e.g.*, May 7, 1985 Order, Case No. U-7792; February 10, 1987 Order, Case No. U-8559.

Note too that the utilities must operate subject to numerous federal laws, including laws regulating the

health and safety of the work place and working conditions for employees, taxes, Securities and Exchange Commission reporting, and environmental matters. But none of these federal "mandates" have been held to oust the Commission of subject matter jurisdiction to review or consider related elements of cost.

With respect to the nuclear waste disposal fees, unlike the ordinary circumstances presented in the filed rate cases, where the utility receives its tariffed services at the tariffed rate, there seems to be no dispute in this case that the federal government is in default of its contractual obligations. And unlike the statutes administered by the FERC, where the Supreme Court left open the question in *Entergy*, supra, whether FERC retained exclusive jurisdiction to determine whether an approved agreement was breached, there is no basis to conclude that Congress delegated to the DOE or NRC responsibility for determining whether the DOE's own contracts were breached and what the damages should be.[21] In default

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[21] In *Entergy Louisiana, Inc v Louisiana Public Service Com'n*, 539 US 39; 123 S Ct 2050, 156 L Ed 2d 34 (2003), the Court was presented with the question whether costs assigned to Entergy Louisiana by the operating committee constituted under the contract at issue, but arguably in violation of that contract (the "filed rate"), justified the Louisiana Commission's determination to reject the cost assignment. Because the Louisiana Commission and the Louisiana Supreme Court disclaimed any authority to determine whether the FERC-approved agreement had been violated, there was no such determination on the record. Thus, the Court declined to address the question whether FERC had exclusive jurisdiction to determine whether that agreement had

of such a regulatory scheme, the courts have stepped in to fill this role.

The Nuclear Waste Fund is obviously an important purpose of the NWPA. Yet the text of sections 10222 and 10131 of the NWPA do not expressly mandate the nuclear waste disposal fees be paid. While the statute by its express terms does not mandate payment of the fees, it does require the utilities to enter into the contract as a condition of licensure or license renewal. The standard contract also has penalty provisions in the event that fees are not paid on time. 10 CFR § 961.11, Art. VIII.C. In numerous cases, moreover, courts have recognized that payment of the fees is the "quid pro quo" for the DOE's obligation to dispose of SNF. *See, e.g. Alabama Power Co v U.S. Dep't of Energy*, 307 F 3d 1300 (CA 11 2002); *Indiana Michigan Power Co v Dep't of Energy*, 88 F3d 1272, 1276; 319 US App DC 209 (1996) ("DOE's duty under subsection (B) [of section 10222(a)(5)] to dispose of the SNF is conditioned on the payment of fees by the owner and is trigged, at the latest, by the arrival of January 31, 1998."). The exact nature of the fee obligation has been the subject of some significant confusion with seemingly contradictory decisions from the federal courts. In *Commonwealth Edison Co v U.S. Dep't of Energy*, 877 F2d 1042, 1045; 278 US App DC 254 (1989), the D.C. Circuit reviewed the DOE interpretation of the term "Treasury bill rate" in the standard contract, and found deference to the DOE's

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been violated. Here, the federal courts have already determined that DOE breached its obligations under its contracts with the utilities.

interpretation was appropriate because the contract should be viewed as a regulation:

> Commonwealth Edison was not free to dispose of its waste in whatever manner it desired; indeed, it had no real choice but to agree to whatever terms the federal government offered.
>
> This is not, in other words, the typical government contracts situation. The fee paid by utilities into the Fund resembles an assessment or tax more than it does a freely negotiated price.

At least one court has cautioned what might be the likely result of a utility withholding a fee when it distinguished the Tennessee Valley Authority's claim for "partial breach" of contract from a claim for "total breach" by the DOE:

> TVA's claim is necessarily solely a claim for partial breach—a claim for total breach would abort the contract, thereby obviating DOE's obligation to collect TVA's SNF and HLW in the future and most likely resulting in the forfeiture of TVA's operating license pursuant to 42 USC §10222(b). [*Tennessee Valley Authority v United States*, 60 Fed Cl 665, 677-678 (2004)]

Respondents cite this decision, and the refusal of the federal courts in *Indiana Michigan Power Co v Dep't of Energy*, 88 F3d 1272; 319 US App DC 209 (1996), and *Northern States Power Co v U.S. Dep't of Energy*, 128 F3d 754; 327 US App DC 20 (1997) to order that the utilities withhold or escrow fees payments, in support

of their argument that payment of the fees is mandatory regardless of the DOE's breach. Note, too, that in *Alabama Power*, supra, the 11th Circuit found that the DOE violated the NWPA by entering into a contract with the utility to "settle" the utility's breach of contract claim by modifying the contract to provide for an offset of future payments of fees that would otherwise have been deposited to the Nuclear Waste Fund.

On the other hand, in evaluating the utilities' claims against the United States, several courts have held that the DOE's obligation to dispose of spent nuclear fuel is only contractual. *Yankee Atomic Electric Co v United States* 42 Fed Cl 223 (1998); *Consumers Energy Co v United States*, 57 Fed Cl 278 (2003); *Commonwealth Edison Co v United States,* 56 Fed Cl 652 (2003). While the obligation to enter into the contract was a statutory obligation, the obligation to provide disposal is only contractual, reason the courts, and thus the utility plaintiffs are limited to contract remedies and cannot bring an action for a taking or illegal exaction. If the DOE's obligations are not statutory but contractual, then correspondingly the utilities' obligations to pay the spent nuclear fuel disposal fees are also contractual.[22] Note, too, that the Court of Claims in *Yankee Atomic Electric Co v United*

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[22] As explained above, some courts have considered the obligations of the parties to be both contractual and statutory. *See Indiana Michigan Power Co v Dep't of Energy*, 88 F3d 1272, 1277; 319 US App DC 209 (1996)("[W]e hold that section 302(a)(5)(B) creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998.")]

States, 2004 WL 1535688, unpublished decision (June 28, 2004) (Docket No. 98-126C), indicated without comment or discussion that the plaintiff utilities had ceased to pay nuclear waste disposal fees as of the date of the DOE's default.

As explained above, a hallmark of pre-emption is the need to further Congressional policy. In evaluating whether it would frustrate Congressional policy to allow state rate setting agencies to condition the collection of fees in rates on placement in an external fund pending some contingency regarding federal compliance with the contracts, Complainants also argue that it is relevant that Congressional policy has already been frustrated by the DOE's failure to meet the 1998 deadline. Thus, Complainants argue any obligation to pay the ongoing fee terminated in 1998. (Brief, p. 63). The Court in *Northern States Power Co v U.S. Dep't of Energy*, 128 F3d 754; 327 US App DC 20 (1997) concluded that Congress intended that the parties pursue their contractual remedies, but the Court in *Maine Yankee Atomic Power Co v United States*, 225 F3d 1336 (CA Fed 2000), found that the administrative remedies provided for in the contract were inadequate and not applicable to the DOE's more significant breach. *See also Northern States Power Co v United States*, 224 F3d 1361 (CA Fed 2000).

For these reasons, I find the filed rate doctrine, while not irrelevant, sheds no light on the question presented here: the extent to which Congress in the NWPA and AEA intended to pre-empt State regulatory review of the costs of nuclear waste handling, storage and disposal in setting retail rates. For the reasons stated above, I have concluded that the NWPA does

not pre-empt all Commission jurisdiction to inquire into the extent of, and reasonableness and prudence of, costs incurred or to be incurred by the utilities for spent nuclear fuel handling, storage and disposal. Given this conclusion, it is not necessary to determine the extent of the Commission's jurisdiction under federal law to grant each and every one of the remedies identified in the Complaint. I further find that the scope of the Commission's jurisdiction may turn on factual matters that cannot be ascertained from the complaint, such as the nature and character of the costs at issue, or the basis for the Complainants' allegations that the utilities' conduct has been unreasonable and imprudent. While I am not convinced on the basis of the arguments presented that there are significant federal limitations on the Commission's ability to protect ratepayers from unnecessary or duplicative spent nuclear fuel storage and disposal costs, any remedies that the Commission might ultimately consider, based on any factual record ultimately created, can then be evaluated to determine whether they conflict with the goals or regulations of the AEA or NWPA.

IV.

COMMISSION JURISDICTION UNDER STATE LAW

The Commission's rules of practice and procedure define "prima facie case" as "a case in which, assuming all the facts in the complaint are true, the complainant is requesting a remedy that is within the jurisdiction of the commission to grant." R 460.17101(j). The requirement that Complainants state a prima facie

case entails two types of inquiries, a consideration whether the relief requested is within the scope of the Commission's authority under its enabling statutes, and a determination whether sufficient facts have been pled to justify relief. Given that the complaint cannot be dismissed on the basis of federal pre-emption, it is next necessary to consider the Respondents arguments that the Commission lacks state statutory authority to grant the relief requested. The factual sufficiency of the complaint is addressed in section V below.

The MPSC enabling statutes relied on by the Complainants include the Michigan Public Service Commission Act, 1939 PA 3; MCL 460.1 *et seq.*; the Public Utilities Commission Act, 1919 PA 419, MCL 460.51 *et seq.*; the Electric Transmission Act, 1909 PA 106, MCL 460.551 *et seq.*; and the Railroad Commission Act, 1909 PA 300, 462.2 *et seq.*[23] Of those provisions, MCL 460.6, MCL 460.54, and MCL 460.552, while appearing to confer broad authority on the Commission, have been characterized as general outlines or descriptions rather than express grants of authority. *See Union Carbide Corp v Public Service Com'n*, 431 Mich 135; 428 NW2d 322 (1988).

At least the following provisions expressly require the Commission to investigate a complaint making certain allegations. MCL 460.58 provides:

> Upon complaint in writing that any rate, classification, regulation or practice charged,

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[23] The complaint also cites provisions of the Michigan Administrative Procedures Act, MCL 24. 201 et seq.

made or observed by any public utility is unjust, inaccurate, or improper, to the prejudice of the complainant, the commission shall proceed to investigate the matter. The procedure to be followed in all such cases shall be prescribed by rule of the commission: Provided, however, That in all cases reasonable notice shall be given to the parties concerned as to the time and place of hearing. An investigation of any such complaint, and the formal hearing thereon, if such is deemed necessary, may be held at any place within the state and by any member or members of the commission, or by any duly authorized representative thereof. Witnesses may be summoned and the production of books, and records before the commission, or the member, or any duly authorized representative thereof conducting the hearing, may be required. . . Upon the completion of any such hearing, the commission shall have authority to make an order or decree dismissing the complaint or directing that the rate, charge, practice or other matter complained of, shall be removed, modified or altered, as the commission deems just, equitable and in accordance with the rights of the parties concerned.

MCL 460.557(1) provides:

The commission shall investigate each complaint against an electric utility submitted in writing by a consumer or a city, village or township concerning the price of the electricity sold and delivered, the service rendered, or any other matter of complaint. The commission's

agents, examiners, inspectors, engineers, and accountants may inspect the system and method used in transmitting and supplying electricity and examine the electric utility's books and papers pertaining to transmitting and supplying electricity, services, rendered, or any other matter of complaint.

MCL 462.22(a) provides:

Upon complaint in writing of any person, firm or corporation or association, or of any mercantile, agricultural or manufacturing society, or of any body politic or municipal organization, that any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation or practice whatsoever affecting the transportation of persons or property or any service in connection therewith, is in any respect unreasonable or unjustly discriminatory, or that any service is inadequate, the commission shall notify the common carrier complained of that complaint has been made and shall furnish a copy of the said complaint with said notice, and 20 days after such notice has been given the commission may proceed to investigate the same. . . If, upon such investigation, the rate or rates, joint rate or rates, fares, charges or classifications, regulation, practice or service complained of shall be found to be unreasonable, inadequate or unjustly discriminatory, the commission shall have power to and it shall determine and by

order fix and order substituted therefore, such rate or rates, joint rate or rates, fares and charges, as is or are just and reasonable, and which shall be the maximum to be charged in the future, and such classifications, regulation, practice or service as is or are just, reasonable and adequate, and which shall be imposed and followed or service rendered in future in lieu of that found to be unreasonable, inadequate or unjustly discriminatory, and in either case the commission shall make an order that the common carrier cease and desist from such violation, and shall conform to the regulation and practice so prescribed, and it shall cause a certified copy of each such order to be delivered.

MCL 462.24 provides:

The commission may, at any time upon application of any person or any common carrier, and upon at least 10 days' notice to the parties interested, including the common carrier, and after opportunity to be heard as provided in section 22, rescind, alter or amend any order fixing any rate or rates, fares, charges or classifications, or any other order made by the commission, and certified copies shall be served and take effect as herein provided for original orders.

Respondents argue that these statutes do not confer jurisdiction on the Commission in this matter because the complaint does not challenge "any rate, classification, regulation or practice charged, made or observed" (MCL 460.58); "the price of the electricity

sold and delivered, the service rendered or any other matter of complaint" (MCL 460.557); or "any rate, fare, charge or classification" (MCL 462.22(a)). Respondents' arguments are based in part on their assertion that the complaint seeks relief from the federal government rather than from this Commission.[24] As explained above, I conclude that the complaint does not seek relief from the federal government, but instead seeks whatever relief it is within the Commission's authority to grant, asserting in support of its request that any such relief may encourage the federal government to meet its obligations under the NWPA and its contracts with the utilities. By its express language, the complaint alleges that the rates charged by the utilities are unjust and unreasonable.

Respondents argue that to fall within the complaint statutes, the subject matter of the complaint must go directly to the utility-customer relationship. While the complaint alleges that the rates charged by the utilizes are unjust and unreasonable, Respondents argue that the accounting, reporting and other non-rate relief Complainants seek do not affect the "utility-customer" relationship and thus cannot be a legitimate basis for complaint. The Wisconsin utilities argue that the doctrine of *ejusdem generis* means that the language of the Electric Transmission Act, MCL 460.557 "or any other matter of complaint" must be interpreted narrowly as part of a limited list of items that should

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[24] "The complaints envisioned [by the utility statutes] are those that relate to the relationship between the utility and its customers, not the utility and the federal government." (Consumers Energy Brief, p. 17)

be similar to each other, to preclude a complaint based on anything other than the utility-customer relationship. (WPSC Brief, pp. 8, 19). The utilities make similar arguments with regard to the other complaint statutes.

I find the doctrine of "*ejusdem generis*" is not helpful in determining the meaning of the phrase "any other matter of complaint". It is difficult from the two broad categories in MCL 460.557, "price" and "the service rendered," to infer that the legislature intended to impose a significant limitation on the Commission's jurisdiction by the phrase "any other matter of complaint." If the legislature intended that the matters of complaint be limited to rates and services, there would be no need for the catchall phrase. *See, e.g., Michigan Consolidated Gas Co v MPSC*, 264 Mich App 424, 434; 691 NW2d 29 (2004). Looking at the Electric Transmission Act as a whole, the presumption should be that "any other matter of complaint" refers to any other matter the Commission has authority to address under that statute. This conclusion is consistent with WPSC's assertion that: "The phrase 'or any other matter of complaint' does not grant the Commission unbridled authority to resolve any matter or supersede all other statutory limitations on the Commission's authority, solely on the basis that the matter was raised in a complaint." (Brief, p. 8). The Commission's Rule 501, R 460.17501, appropriately provides:

> A complaint shall be limited to matters involving alleged unjust, inaccurate, or improper rates or charges or unlawful or

> unreasonable acts, practices or omissions of a utility or motor carrier.

To some extent, Respondents' arguments confuse the question of the appropriate subject matter of a complaint with the relief requested. WPSC argues, for example, with regard to the accounting and reporting practices requested in the complaint:

> The ordering of such actions is not authorized in any of the statutory provisions controlling complaint proceedings. To the extent the Commission is authorized to take such action, it may do so on its own motion or other procedure, such that a contested case proceeding upon a complaint is neither authorized, required nor warranted to take such action. Since the relief requested is entirely outside the scope of the complaint proceeding, Paragraphs 61 through 67 of the Complaint fail to state a claim on which relief can be granted in this complaint proceeding, and should be dismissed. [Brief, pp. 18-19]

As explained below, nothing in the language of the complaint statutes divests the Commission of authority to implement a remedy it is otherwise empowered to adopt merely because the proceeding was initiated by complaint rather than on the Commission's own motion. Even if some forms of relief requested in the complaint, e.g. investigation, accounting or reporting requirements, would not directly modify the "utility-customer relationship", these are the remedial actions that follow a determination on the merits, not the basis for the

complaint. The matters of complaint are the allegedly unreasonable rates and unreasonable practices of the utilities. Since the complaint alleges actual injury as a result of these rates and practices, it is difficult to conclude that the subject matters of complaint do not go to the utilities rates and practices within the meaning of the complaint statutes identified above and R 460.17501. Since the subject matter of the complaint is within the subject matter of a complaint case, the question then becomes whether the Commission has authority to grant relief.

Respondents directly challenge the Commission's authority to award the non-rate relief requested in the complaint by arguing the complaint statutes expressly limit the Commission's authority to award relief to the items of relief identified in those statutes, rate changes and modifications of the "terms and conditions of service." This argument harkens back to the discussion above regarding the nature of the complaint. Viewed as a petition addressed to the Commission's discretion, the Complainants may ask the Commission for any relief they want. While they may not compel the Commission to hold a hearing on their request, they may properly bring to the Commission's attention any matter they want the Commission to consider. It should also be noted that MCL 462.24 gives any person the ability to seek to amend or alter a prior Commission decision. While this provision again does not compel the Commission to hold a hearing, it reinforces the idea that any matter which is properly the subject of the Commission's authority is properly the subject of a petition to the Commission.

Additionally, the Respondents' assertions that the relief a party may seek in a complaint case is essentially limited to rate and tariff changes is without merit. While the nature of the injury that gives rise to the complaint must meet the statutory criteria (e.g., "a complaint in writing that any rate, classification, regulation or practice charged, made or observed by any public utility is unjust, inaccurate or improper") there is no limitation on the Commission's authority to award relief that is otherwise within the Commission's jurisdiction. Grants of authority in complaint statutes allowing the Commission to modify rates and tariffs in complaint proceedings do not foreclose the Commission from taking other action it has authority to take, on the basis of factual findings it may make, as long as the procedures required by other statutes are complied with. For example, the Commission may initiate rulemaking based on its review of a contested case record, but must comply with the rulemaking provisions of the APA. As explained above, the Commission is not required to exist in a vacuum and close its eyes and ears to matters presented to it; instead, the Commission depends on information to inform its discretion. *See, e.g.* the Commission's July 16, 1987 Order in Case No. U-8586, where the Commission denied rate relief to the Attorney General on his complaint, but ordered Consumers Power to file a rate case within six months. *See also, Michigan Bell Telephone Co v PSC*, 214 Mich App 1 (1995), in which the Court found that the complainant did not meet the test for standing, but did not invalidate the Commission's subsequent order in Case No. U-10620, a generic case to develop a method for resolving one of the disputed issues in the complaint case, how to determine long-run incremental costs. The

Commission cannot be prevented from taking action merely because it gains knowledge of facts warranting assertion of its regulatory authority from a complaint, rather than from its staff or a utility's annual report.

Here, as discussed above, Complainants do allege that the rates of the utilities are excessive and that the conduct of the utilities are unreasonable because they are not taking action to control their nuclear fuel storage and disposal costs, and are continuing to generate nuclear waste without a clear commitment how to pay for its storage and disposal. Since this falls within the scope of the complaint provisions, it is appropriate for the Complainants to seek that relief they allege is within the scope of the Commission's authority to grant.

Because I conclude that the complaint statutes do not limit the Commission's authority to act to protect the public interest on the basis of facts it may find while investigating a complaint, it is necessary to consider whether the relief Complainants seek is otherwise clearly outside the scope of the Commission's authority under its enabling statutes. As explained above in the discussion of subject matter jurisdiction, it is not possible to resolve fully all questions of the Commission's jurisdiction, since the exercise of such jurisdiction cannot be meaningfully separated from the factual findings the Commission would make as a predicate to exercising its jurisdiction. Breaking down the relief requested into its component parts, however, it is clear that the Commission has the generic authority to grant at least some of the types of relief requested. While this conclusion resolves the jurisdictional issues for

purposes of Respondents' motions, it must be emphasized that any final determination should await a concrete factual situation in which competing jurisdictional claims can be evaluated.

A. Investigation

The first three items of relief requested in the complaint essentially seek to invoke the Commission's investigatory powers. (See paragraphs 61-67). The Commission has broad powers to conduct investigations, including the ability to audit the books and records of the utilities and to require utility management to appear and answer questions regarding the operation and management of the utility. MCL 460.55; MCL 460.56; MCL 460.556; MCL 462.28a. Not only does the Commission have the authority to conduct an investigation on its own initiative, the complaint provisions of MCL 460.58 and 460.557 require that the Commission conduct an investigation when a complaint is filed.

Respondents cite the recent Court of Appeals decision, *Michigan Environmental Council v Wisconsin Electric Power Co*, unpublished decision, 2004 WL 1058190 (May 11, 2004) (Docket Nos. 244354, 246744), for the proposition that the Commission cannot conduct an investigation unless it finds that the utilities' conduct is reasonable and prudent. Respondents rely on the follow statement found in the Court's opinion:

> No statute authorizes the PSC **to take action** such as that suggested by MEC and PIRGIM in either a general rate case or a PSCR proceeding

> absent a finding of unreasonable or imprudent action by a utility. [*Id.* at 3 (emphasis added)]

The question that must be posed is what "action" is the Court referring to? Clearly the Commission cannot grant all the final relief requested by Complainants without making a finding of unreasonable or imprudent conduct. On reviewing the court's decision, I conclude that the Court of Appeals statement upon which Respondents rely is taken out of context, and does not state a legal conclusion with regard to the Commission's investigatory powers. As counsel for Wisconsin Electric forthrightly acknowledged at oral argument, the utility did not argue that the Commission lacked authority to obtain information from the utilities absent a finding of unreasonableness or imprudence. Tr. 45. Moreover, just prior to this statement, the Court discusses the Commission's decision to include in rates the utility-requested spent nuclear fuel costs, and correctly summarizes the basis for the Commission's decision:

> The PSC did not conclude that in the context of a general rate case it lacked jurisdiction to implement the remedies proposed by MEC and PIRGIM. Rather, the PSC determined that implementation of the suggested remedies was not necessary to correct any unreasonable or imprudent action by WEPCO. WEPCO included costs related to SNF disposal and payment of the SNF fee in its base rate which it sought by application to increase. The PSC did not presume that SNF costs were subject to automatic recovery, but rather scrutinized

> WEPCO's rate increase request in contested case hearings. [*Id.* at 3]

The Court acknowledges in this passage, and elsewhere in its decision that the Commission did investigate, through the contested case record, the spent nuclear fuel costs the company included in its rate request:

> WEPCO's witness testified that the utility acted reasonably and prudently with respect to SNF disposal costs. The witnesses presented by MEC and PIRGIM did not give contradictory testimony. [*Id.* at 4]

Thus, it is not reasonable to interpret the Court's decision in this case as limiting the Commission's investigatory authority. Such a limitation of the Commission's investigatory powers contradicts the plain language of sections MCL 460.55; MCL 460.56; MCL 460.556; MCL 462.28a, and is contrary to judicial decisions that have recognized the breadth of the Commission's investigatory powers. *See, e.g.*, *Attorney General v MPSC*, 412 Mich 385; 316 NW2d 187 (1982); *Chesapeak & Ohio Railway v MPSC*, 59 Mich App 88 (1975); 228 NW2d 843 (1975); *Telephone Assoc of Mich v MPSC*, 210 Mich App 662; 534 NW2d 223 (1995). At a practical level, how could the Commission determine that a utility's conduct was unreasonable or imprudent unless it had the ability to inquire into the pertinent facts?

The Commission can further conduct an investigation as a contested-case type proceeding, with the goal of resolving disputed facts, as it has done on

numerous occasions. *See, e.g.*, Case No. U-8586 (July 16, 1987 Order, p. 3 at n2), in which the Commission recognized that it satisfied its obligation to investigate complaints by conducting a hearing. *See also, Champion's Auto Ferry,* supra. Of course, as the Respondents note and as discussed elsewhere in this PFD, the Commission does not usually hold a contested case hearing merely to determine if further investigation is warranted.

B. External funding of pre-1983 costs

The fourth item of relief requested, paragraphs 68-70, concerns only Consumers Energy, and seeks to have the Commission require that funds contributed by ratepayers but not yet paid to the federal government be placed into an external fund. These are the funds to cover the disposal costs of spent nuclear fuel generated before April 7, 1983. The utilities broadly argue that the Commission lacks any authority to require external funding, relying on the absence of an express statutory reference to "external funding" or "trust funds", and on the Michigan Supreme Court's decision in *Union Carbide Corp v Public Service Com'n,* 431 Mich 135; 428 NW2d 322 (1988). Complainants assert that the ability to require external funding is part of the Commission's traditional ratemaking authority.

Based on a review of prior Commission decisions, it is clear that the Commission has long asserted the authority to require that monies collected from ratepayers be placed in external funds as part of its traditional ratemaking jurisdiction. In U-6150, as the Complainants note, the Commission established

external funds for nuclear decommissioning trusts; in Case No. U-7219, the Commission established an external fund for pre-1983 spent nuclear fuel costs for I&M. Respondents point out, however, that in these cases, the utilities voluntarily agreed to external funding. While some external funding requirements have been established with the consent of the utility, that has not been true of all external funding requirements imposed by the Commission. In Case No. U-10040, for example, the Commission required the utilities to place monies collected for SFAS 106 costs (post-retirement benefits) into external funds. The Commission explained:

> In the Commission's view, it is not enough to say that later rate orders could disallow any increased costs arising from unreasonable management decisions about, or uses or, internal funding. The Commission has experience with the consequences of utility mismanagement in other settings. Based on that experience, the Commission finds it likely that a utility would argue that for the good of the utility, its ratepayers, its employees, other utilities, and the state as a whole, at least a portion of the cost of that mismanagement must be shifted to its ratepayers. Ratepayers are not well served by requiring them to fund these costs in a manner that creates the risk of paying twice or that creates too great a temptation for utility management, a corporate raider, or a parent corporation to avail itself of abundant cash.

See, also Case No. U-10102, January 21, 1994 Order, requiring that funds collected by Detroit Edison for low-level radioactive waste disposal be placed into one of the utility's external decommissioning trusts.

The utilities' argument also ignores some of the circumstances surrounding the "voluntary" agreements. As explained above, an express purpose of the Commission's investigation in Case No. U-6150 was to determine whether external funding should be required. As the Commission stated in clarifying the scope of the generic proceeding:

> One purpose of the generic proceeding would be to determine whether it would be more cost effective to allow the utilities to use the funds for whatever purpose they choose, thereby obviating the necessity of seeking those funds on the capital markets; or whether a trustee administered fund would be the best approach; or whether there is some other approach available that would meet the twin goal of low cost to the ratepayer and the availability of funds for decommissioning. [January 22, 1980 Order, pp. 2-3]

And in Case No. U-7219, approving by settlement agreement an external trust for I&M Power's pre-1983 SNF disposal costs, the Commission's approval order found that the question of whether external funding would be required had been deferred from an earlier case. (December 20, 1983 Order, p. 2). Moreover, Commissioner Anderson's dissenting and concurring opinion in that case strongly expressed her opinion

that the Commission had jurisdiction to require external funding:

> I continue to dissent from settlement agreements by the Staff with the companies and intervernors which are used to plow new ground and extend beyond what this Commission has authorized in contested rate case proceedings. The Commission has no policy or procedures for nuclear decommissioning so it is hardly reasonable to authorize assessment of ratepayers for such costs. On the other hand, as long as the majority is allowing monies to be collected for spent nuclear fuel disposal costs, I have no choice but to agree that they must be placed in a trust fund." [December 20, 1983 Order, p. 5]

Case No. U-6150, discussed in section I above, was pending at the time, and the settlement approved in Case No. U-7219 provided that if decommissioning costs were not required to be placed into external trusts as a result of the Commission's decision in Case No. U-6150, then I&M Power could seek to modify the external funding requirements in Case No. U-7219.

The utilities argue that requiring an external fund for sums collected from ratepayers would violate the limitation on the Commission's ability to make managerial decisions recognized in *Union Carbide, supra*. The *Union Carbide* Court, however, did not address escrow accounts or any other matter related to the Commission's ratemaking authority, but instead considered whether the Commission could issue an order directing the manner in which the utility

dispatched its electric generating plants. The Court viewed this as a managerial decision outside the Commission's usual authority, finding that its traditional ratemaking authority, and its ratemaking authority as set out in Act 304, provided sufficient protection for ratepayers. *See also Detroit Edison Co v PSC*, 221 Mich App 370; 562 NW2d 224 (1997) (Commission could not design demand-side management program). In Case No. U-10040, however, the Commission squarely addressed this argument and concluded that its ratemaking authority authorized it to condition collection of the rates on the creation of an external fund:

> The Commission rejects the argument that it is forbidden from making findings regarding the funding of postretirement benefits under *Union Carbide*, supra. . . [I]t may be that the Commission cannot require utilities to externally fund their postretirement benefits. However, it can refuse to allow recovery of accruing postretirement benefit costs that are not externally funded. In the Commission's view, to charge ratepayers for SFAS 106 costs without the utility's commitment to externally fund those costs would not be just or reasonable. [December 8, 1992 Order, p. 17]

The *Union Carbide* and *Detroit Edison* decisions support the conclusion that the Commission has broad ratemaking authority, and can use that to protect ratepayers in lieu of directing the business operations of the company. Other judicial decisions have also recognized that the Commission's ratemaking authority includes the authority to impose reasonable

conditions on the receipt of monies. *See, e.g. Consumers Power Co v PSC*, 181 Mich App 261; 448 NW2d 806 (1989). At some level, all regulation of public utilities could be said to interfere with the discretion of management; management would certainly prefer to have the ability to set the rates the utility charges, but that is clearly not what the court meant in *Union Carbide*. *See, e.g. Detroit Edison v MPSC*, 261 Mich App 1, 12-13; 680 NW2d 512 (2004) ("Because appellants' desired interpretation could be construed to prevent the PSC from overseeing any of appellants' business practices, we find this argument without merit.") Requiring that funds be set aside for their intended purpose is not equivalent to a "managerial decision" and is not on par with an order directing the dispatching of utility power plants or designing a cost containment program. The analogous "managerial decision" in the external funding context would be the selection of the fund manager.

Thus, based on the Commission's longstanding interpretation of its authority, and judicial recognition that the Commission has broad ratemaking authority, I conclude that requiring external funding is not outside the scope of the Commission's authority.

C. External funds for SNF fees

In paragraphs 71-73, Complainants ask the Commission to require that all sums collected from ratepayers for SNF disposal fees be placed into an external trust fund. As explained above, the Commission's long-standing interpretation of its ratemaking authority includes the ability to condition the collection of monies from ratepayers on the

creation of external trusts to segregate funds collected for a particular purpose. With regard to the ongoing SNF fees, however, Respondents argue that the monies must be paid into the Nuclear Waste Fund. As discussed above in section III, the extent of the Commission's authority to require that such funds be placed into escrow cannot be determined based on the present record. Respondents argue that the fees must be paid as a matter of federal law; Complainants dispute this and claim that escrowing the money is a legally defensible contract remedy that the utilities can lawfully and reasonably employ. There is conflicting authority in the federal judicial decisions that have looked at the NWPA and the utilities' contracts; at least two utilities seem to have been withholding fee payments, but they may have claims to actual damages that the Michigan utilities cannot support or do not have equal claim to. The Commission has so far rejected Complainants' argument that payment of the spent nuclear fuel disposal fees to the Nuclear Waste Fund in accordance with the contract terms is unreasonable or imprudent.

Respondents also argue that the Commission lacks authority to escrow funds because they are covered by Act 304, which requires that the utilities recover all reasonably and prudently incurred power supply costs, including spent nuclear fuel, and the Commission's options under Act 304 do not permit escrow. Yet the Commission has recognized authority even under Act 304 to scrutinize the utilities' management of their contracts, including federally regulated contracts. The Commission can disallow expenses under Act 304 that it determines would be unreasonable. In rejecting the Complainants' arguments in PSCR Cases Nos.

U-12613 and U-12615, the Commission did not conclude that it was powerless to act to protect ratepayers under Act 304, but rather that it did not have an evidentiary basis to conclude that payment of the ongoing fees by the utilities would be unreasonable or imprudent.

Wisconsin Electric and WPSC cite the PFD in Case No. U-12615, which explained that the Commission's authority under Act 304 does not permit the Commission to require that PSCR factor revenues be "escrowed": "Act 304 does not provide that, if the Commission has serious doubts, the Commission can collect the funds from ratepayers and hold them to some contingency or direct that a utility insure against the potential failure of its plan. The Commission cannot sit on the fence." *See* Wisconsin Electric Brief, p. 16. If the Commission were to determine, however, that it is unreasonable and imprudent for the utility to continue to pay SNF disposal fees, the Commission could select among several alternatives, depending on the basis for its conclusion that payment by the utility was unreasonable and imprudent. It could deny recovery under Act 304; it could caution the utility that it was likely to deny recovery unless at reconciliation it appeared that the utilities had managed their federal contracts reasonably by withholding (escrowing) the fees; or it could decide that the costs were no longer appropriate for PSCR clause treatment.[25] Thus, the Commission is not without

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[25] The Commission has already ruled that pre-1983 costs need not be recovered through the PSCR clause. November 26, 1996 Order, Case No. U-11237.

jurisdiction even under Act 304 to protect the ratepayers from unreasonable and imprudent decision-making by the utilities. *See also, Attorney General v MPSC*, 215 Mich App 357 (1996); *Michigan Consolidated Gas Co v MPSC*, 264 Mich App 424, 434; 691 NW2d 29 (2004).

D. Bonding and other financial security

In paragraph 75, Complainants request alternative relief in the form of bonds or other security essentially guaranteeing or ensuring that adequate funds would be available to the utility to cover the costs of SNF disposal:

> The Commission could also order nuclear utilities to file or fund a stockholder-financed performance or surety bond to assure successful SNF disposal by the utility. This could be in the form either of a bond secured from an insurance company or other entity, or could be funded by each utility on an incremental basis from stockholder funds obtained through rate adjustments, directed to a separate MPSC-regulated bond escrow.

Paragraph 77 also identifies bonds as a form of relief "requiring the utility to refund the collections in the event of a failure of SNF disposal or other conditions." Complainants identify other forms of "security", including insurance and letters of credit, which they allege would accomplish the same purpose. Respondents argue that such forms of "security" are outside the scope of the Commission's jurisdiction.

The Commission has recognized its authority to allow utilities to collect certain rates only under bond, subject to refund in the event of specified contingencies or conditions. The most frequent use of a bonding requirement is with an award of interim rate relief, to guarantee that refunds will be available should a final Commission evaluation conclude that the interim award was excessive. *See, e.g.* Case No. U-13691 (October 23, 2003 Order). In Case No. U-9346, the Commission allowed Consumers Energy to collect $35 million toward its O & M expenses under bond, and subject to refund if the utility did not spend the full amount. (May 7, 1991 Order, pp. 63-64) Courts have upheld the Commission's bonding requirements in cases cited in the Complaint, paragraph 77. In *Consumers Power Co v PSC*, 181 Mich App 261; 448 NW2d 806 (1989), the Court upheld a Commission requirement that rates be collected subject to bond and refund in the event Consumers' tax liability under the Tax Reform Act proved to be less than estimated. Courts have also recognized that the Commission has broad authority to implement experimental rates to provide incentives to utilities and to protect consumers.

As discussed in section V below, Complainants do not identify the facts that would be the necessary predicate for a Commission determination to require or seek corporate guarantees from the utilities. It is also not clear whether the "bond" requested would cover only those sums the utilities would be able to recover from the federal government in the event of a default on its obligation to dispose of spent nuclear fuel, or if the bond is intended to provide a sum of money to cover the future and unknown costs of

permanent disposal in the event of a federal default as some language in paragraphs 75 and 77 suggests. (Complainants' Brief, p. 97-98, also suggests that this remedy is designed to provide assurances that ratepayers will receive credit for any damage awards obtained by the utilities.) Because the Commission has broad authority to regulate the rates of the utilities, it is not necessary to speculate on the extent to which the Commission could require performance bonds, or other security as a condition of regulatory approval for some rate or other matter requested by the utility.

E. Rate Relief

Paragraphs 76 and 77 request rate relief to eliminate allegedly duplicative costs. Of course, the most traditional exercise of the Commission's authority is in setting rates. Whether the unspecified rate reductions requested by Complainants would result in just and reasonable rates is a question of fact that cannot be answered on this record. The Respondents argue no rate relief is justified, in part because they assert as a matter of fact that all of their spent nuclear fuel disposal and storage costs are federally mandated. As explained above, merely because an expenditure is federally mandated does not require that the Commission consider it a cost that must necessarily be passed on to ratepayers, e.g. the Commission considered the environmental cleanup costs mandated by state and federal law to be only partly a utility expense in Cases Nos. U-10630 (April 13, 1995 Order) and U-11127 (July 31, 1997 Order). Also as explained above, this assertion does not deprive the Commission of jurisdiction to review the costs. Nonetheless, the Commission generally

disfavors single-issue rate proceedings, although it reserves the discretion to conduct them when necessary. Respondents argue that their rates have already been reviewed, or are currently undergoing review, and there is no need for further review, but the Commission has broad authority to revisit, reconsider or revise its prior rate determinations.

F. Declaratory Relief

The last category of relief sought by Complainants is declaratory relief. In paragraphs 78 and 79, Complainants ask that the Commission assert or declare its jurisdiction to protect ratepayers in this matter. The Commission has authority under the APA to issue interpretive statements regarding its enabling statutes and administrative rules, and it has authority expressly to issue declaratory rulings pursuant to sections 63 and 64 of the APA and Rule R. 460.17701 of its rules of practice and procedure. But I am not aware of, and no party has cited, any decision of the Commission which is purely declaratory in nature and not issued in the context of actual facts, as is contemplated by the APA. While the Commission has authority to opine on the scope of its jurisdiction, it is unlikely definitively to do so where its jurisdiction has not been properly challenged and there is no actual state of facts that would make its ruling more than dicta.

G. Retroactive ratemaking

Respondents broad assert that the relief requested in the complaint is foreclosed by prohibitions on retroactive ratemaking. It is not necessary to resolve

at this juncture whether some of the rate relief identified by Complainants would constitute retroactive ratemaking. It is sufficient to note that Complainants are seeking prospective changes in utility rates, or in the conditions imposed on the collection of those rates. Since the utilities allegedly seek ongoing costs associated with spent nuclear fuel storage and disposal, all rate relief cannot be considered "retroactive." Courts have generally refused to consider such prospective changes as "retroactive". *Attorney General v MPSC*, 262 Mich App 649; 686 NW2d 804 (2004); *Michigan Consolidated Gas Co v MPSC*, 264 Mich App 424, 691 N W2d 29 (2004).

With regard to funds collected to fund the pre-1983 spent fuel obligations to the federal government, the complaint is directed to Consumers Energy. Merely because funds have already been collected does not mean the Commission has no authority to protect ratepayers: but proper resolution of the question may turn on how the collected monies have been treated by the Commission in prior cases. Counsel for Consumers Energy argues that the pre-1983 spent nuclear fuel disposal fee obligation has been treated essentially as debt in the company's capital structure: it is not out of the realm of reasonableness to hypothesize that the Commission could condition continued interest payments for this debt on the utility's commitment to begin funding an external trust. But as explained below, any such determination requires a fully-developed factual record which is not present here.

Likewise, the utilities focus their retroactive ratemaking arguments on allegations directed to their

damage claims against the utilities. For the reasons discussed above, the Commission has jurisdiction to consider how any such recoveries should be treated, as an offset to storage costs included in rate base or as a contribution to the jurisdictional decommissioning trusts. The Commission is not foreclosed from determining that ratepayers should benefit from any such recoveries. *See, e.g. Michigan Bell Telephone Co v MPSC,* 85 Mich App 163 (1978); *CMS Energy Corp v Attorney General,* 190 Mich App 220; 475 NW2d 451 (1991); *Southern California Edison Co v FERC,* 805 F2d 1068; 256 US App DC 364 (1986). But any such determination is speculative and the nature and type of ratemaking treatment may depend on the theory of recovery underlying any claim.

For these reasons, I conclude that the Commission has broad authority to evaluate the reasonableness and prudence of the utilities' conduct and that it has jurisdiction to grant relief through the use of its investigative and ratemaking authority, but that the exercise of that authority depends on the factual findings the Commission may make. I recommend that the motions to dismiss be denied on the basis that the Commission lacks the legal authority to grant relief, and next examine the sufficiency of the factual allegations underlying the complaint.

V.

SUFFICIENCY OF FACTUAL ALLEGATIONS

As explained above, I find the complaint is most appropriately characterized as a petition, addressed to the Commission's discretion. I reach this conclusion in

part because of the general and conclusory nature of the allegations in the complaint. The Commission's rules of practice and procedure impose the following requirements on formal complaints. Under R 460.505(a)(d), a complaint must contain:

> A concise statement of the facts on which the complainant relies in requesting relief, with the specific allegations necessary to reasonably inform the respondent of the nature of the claims the respondent is called upon to defend, with specific reference where practicable to the section or sections of all states, rules, regulations, orders, and tariffs upon which the complainant relies in filing a complaint.

Rule 515 requires that complainants bear the burden of proof as to matters constituting the basis for the complaint. R 460.17515. This language is similar to the language of MCR 2.111(B)(1), which requires a complaint in a civil action to include:

> A sta ment of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend.

As explained by the Michigan Court of Appeals in *City of Auburn v Brown*, 60 Mich App 258, 263; 230 NW2d 385 (1975):

> The purpose of the complaint and the primary function of all pleadings is to give notice of the

> nature of the claim sufficient to permit the opposite party to take a responsive position.

See also *White v. Busuito*, 230 Mich. App. 71, 78 n7; 583 NW2d 499 (1998) ("The facts necessary to constitute a cause of action must be alleged with 'reasonable definiteness and certainty,'" quoting *Simonelli v Cassidy*, 336 Mich 635, 644; 59 NW2d 28 (1953)).

Consumers Energy argues that Respondents have not stated sufficient factual allegations to establish a prima facie case or to warrant proceeding to a contested case.[26] Consumers Energy asserts in its brief: "The Complaint contains numerous generalizations, conclusory remarks and vague allegations. There is no question that it is long. However, it does not contain a concise statement of facts insofar as they relate to Consumers Energy." (Brief, p. 27). Detroit Edison asserts that the Complainants "failed to allege or demonstrate any credible basis for finding that SNF costs are `unreasonable or imprudent. " (Brief, p. 17). I&M Power asserts in its motion: "Overall, MEC et al. fail to allege any specific fact, cost or conduct which would underlie the general allegations. To the extent MEC et al.'s allegations challenge the reasonableness and lawfulness of AEP's rates, MEC et al also fail to

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[26] Consumers argues a complainant has "no absolute right to an evidentiary hearing simply because it filed a complaint. The complaint must still meet procedural and substantive requirements." (Brief, p. 17)

specify, in particular, the costs which should be disallowed." (p. 3)

The utilities also argue that under 2000 PA 141, rates are frozen until January 1, 2006. While that has not stopped the Commission from addressing rates, as the utilities also note, rates that have been established by the Commission are prima facie lawful and reasonable. And since the complaint has been filed, rate case decisions have been issued for Consumers Energy and Detroit Edison.

In reviewing the complaint, I find that its allegations are stated in conclusory fashion, and do not provide sufficient detail for the utilities to respond meaningfully to the principal allegations that the rates are excessive and duplicative, and that the utilities have not reasonably managed their spent nuclear fuel costs. While the complaint expressly alleges that Respondents' rates are unjust and unreasonable, there is no way to determine from the complaint the extent to which rates are alleged to be excessive; likewise, the complaint expressly alleges that the utilities' actions, practices and omissions have been unreasonable, imprudent and contrary to their lawful duties, but no specific actions the utilities have taken or failed to take are identified to warrant the conclusion.

Count V contains the allegations that the rates are unjust and unreasonable. The most substantive allegations supporting Count V are set forth in paragraphs 41 through 43. Paragraph 41 refers to "broad categories" of "duplicative and escalating" costs including "SNF fees for a federal program . . . in default"; "substantial incremental costs . . . for SNF

storage for longer periods than contemplated due to the default"; "increased nuclear plant decommissioning costs"; and "insurmountable costs for SNF disposal if the utilities and the federal government never fulfill their obligations."[27] Paragraph 43 broadly asserts: "Respondent utilities have up to now included all their costs for SNF handling, storage and disposal, including SNF fees, in their cost of service for ratemaking purposes, through Act 304 rate factors, decommissioning charges, and base rates." Then paragraph 43 asserts: "The exact amounts of these costs are potentially known only by the utilities themselves."

Count VI contains allegations that the utilities actions, practices and omissions with respect to SNF fee, storage and disposal matters and associated costs have been unreasonable and imprudent. The most substantive allegations underlying this Count are set forth in paragraphs 47-51. Paragraph 47 alleges that: "Respondent utilities have played a major principal role in the present insecurity that Michigan ratepayers face." Paragraph 48 alleges as unreasonable acts and practices that the utilities: "entered into the business of generating nuclear energy and SNF decades ago without any clear national SNF disposal solution [and thereafter] failed to undertake meaningful action to ensure the success of any of the SNF disposal programs"; "relied on a strategy to continue to generate SNF, to flow through all increasing SNF fee, storage, and disposal costs to ratepayers in rates, and

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[27] This latter category of costs, of course, cannot make present rates excessive.

to transfer the financial risk and obligations . . . to the state's ratepayers;" and had a "generally limited, late, and inadequate" response to the federal delays and "failed to adequately enforce their statutory and contractual rights." This paragraph also alleges that all but one of the Respondents failed to join key federal lawsuits seeking to enforce the standard contracts, that the utilities have failed to ensure that ratepayers will be reimbursed from any damage recoveries the utilities receive in their ongoing federal litigation, and that the relief the utilities are seeking in those lawsuits is inadequate. Paragraphs 49 and 50 allege that the utilities have failed to comply with the rate statutes and with Act 304; and paragraph 51 asserts that the utilities have failed to seek proper Commission approval under Act 304 for "increased costs to be charged to ratepayers for nuclear fuel disposal."

I find that these are general, conclusory allegations, identifying no specific cost items, no dates and no decisions. While a complainant cannot be expected to present specific and definite allegations relating to facts exclusively within the knowledge of the utility or utilities subject to the complaint, more than conclusory allegations supporting an ultimate conclusion of unreasonable and imprudent conduct or unjust and unreasonable rates is required. I conclude that the Respondent utilities cannot meaningfully respond to the complaint by defending all of their rates, and all of their decisions with regard to SNF. The complaint is directed at all five nuclear utilities with little distinction among them, although they have had different and separate rate cases and separate circumstances and decision-making processes

regarding their spent nuclear fuel, and handling, storage and transportation costs. A complaint challenging utility rates should at a minimum give some indication of the extent to which the rates are excessive so that the utilities can prepare their answer and any affirmative defenses. Likewise with regard to the allegations that the practices of the utilities are unjust and unreasonable, the complaint should give some indication of the specific decisions made by the utilities. As the Court held in *Dacon v. Transue*, 441 Mich 315, 332-333, 490 NW2d 369 (1992), explaining that the factual allegations in a complaint were insufficient:

> In [*Simonelli v Cassidy*, 336 Mich 635; 59 NW2d 28 (1953)] this Court affirmed a lower court's dismissal of a complaint for failure to state a claim. The question we considered was whether the complaint before us provided sufficient facts to support a cause of action. This Court held that it did not. As we wrote, "Plaintiff has alleged negligence in failing to diagnose an undefined malady and in failing to take proper precautions to prevent injury during the course of the operation, but we find only one specific factual statement. . . . We do not believe that such allegations constitute a sufficient statement of facts to establish a cause of action." *Simonelli*, *supra* at 643. Although decided in the context of a medical malpractice action, the *Simonelli* Court applied general principles of pleading. Illustrative is the Court's reliance on cases such as *Creen v Michigan Central R Co*, 168 Mich 104; 133 NW 956 (1911), which indicated: "'When a declaration

> fails to advise the defendant with reasonable certainty, according to the circumstances of the case, of the facts upon which plaintiff proposes to rely, and will seek to prove it, it cannot be sustained.'" *Simonelli, supra* at 644. Because *Simonelli* hinged on the importance of fair notice to the defendant and not some procedural quirk of 1950's civil practice, its lesson is neither obsolete nor anachronistic and is one we will continue to follow.

One claim that is asserted with some degree of specificity is Complainants' claim that the continued payment of the ongoing SNF fees is unreasonable given that the federal government is currently in default and may not perform by the current target date of 2010. Because the Commission has previously rejected this claim, however, in full knowledge of these circumstances, some additional factual basis must support the claim.

Likewise, with regard to the claim for relief in the form of bonding requirements or other financial security to provide funding for spent nuclear fuel disposal in the event of a permanent default by the federal government, the potential for federal default does not alone provide the factual predicate for a Commission determination to require the utilities to provide financial security for disposal. While the Commission has generic authority to condition the collection of a rate on the posting of a bond to ensure that the money is used for its stated purpose or available for refund should later review establish refunds are warranted, the complaint itself does not indicate the basis on which the Commission would find

that it is reasonable to impose a contingency on the collection of funds by the utility in this case. Instead, the Complainants' proposal appears to beg the question whether it is reasonable and prudent for the utilities to continue to generate spent nuclear fuel. Similarly with the other forms of financial security identified in the complaint ("standby trust, liability insurance, letter of credit, line of credit, and corporate guarantee"), it is not clear what the contingency would be that would trigger the liability under such instruments, nor does the complaint clearly allege that any such instruments are available.

As explained above, the Commission has the ability to entertain petitions seeking to invoke its jurisdiction. This was the procedure used in Case No. U-6150 when the Attorney General and PIRGIM sought to invoke Commission jurisdiction to provide funding for nuclear decommissioning. *See* October 16, 1979 Order. Because I find that the complaint does not contain sufficient factual allegations that would establish a prima facie case for the exercise of the Commission's ratemaking jurisdiction, I recommend that the Commission dismiss this complaint and treat the complaint as a petition addressed to its discretion, as in Case U-6150, without prejudice to the Complainants' ability to file a complaint with more detailed allegations indicating the specific decisions made by the utility that they allege are unreasonable and imprudent, and/or the specific rate adjustments that need to be made.

VI.

NONJOINDER

I&M Power also argues for nonjoinder, asserting that Complainants have improperly joined all utilities with nuclear power plants in a single complaint, although their factual circumstances differ: "[I]f AEP's individual actions, practices and rates are to be reviewed, fairness dictates nonjoinder for that purpose." (Brief, p. 17).

As a petition asking the Commission to conduct an investigation, whether the petition is filed jointly with respect to all utilities is irrelevant. The Commission may pursue any investigation it deems warranted. In Case No. U-6150, the Commission decided that common questions predominated and rejected a motion for nonjoinder of its investigation. *Id.*, October 16, 1979 Order. Evaluating the complaint as a formal complaint seeking a contested case hearing, however, I would grant I&M Power's motion for nonjoinder. As I&M Power points out, some of the specific relief requested is moot with respect to that utility, because its pre-1983 spent nuclear fuel costs are placed into an external trust, and it has continuing reporting obligations under the Commission's order in Case No. U-7219. More broadly, each of the utilities have had different rate proceedings, and presumably made decisions with regard to spent nuclear fuel handling, storage and disposal costs at different times and with different considerations in mind. I&M Power has recently received an adverse ruling in its federal civil action seeking damages for the DOE's partial breach of contract. In *Indiana Michigan Power Co v United*

States, supra, the Court of Claims held that the utility had not established that it had incurred increased costs due to the federal default. Other utilities have based damage claims on the specific spent nuclear fuel management decisions they have made and the unique costs they have incurred.

Therefore, while misjoinder is not considered a basis for dismissal, since I recommend that the complaint be dismissed as a formal complaint seeking a contested case hearing without prejudice to Complainants' right to refile formal complaints, I further recommend that the Commission require that any such formal complaints be filed individually against one or more of the Respondent utilities.

VII.

CONCLUSION

For the reasons stated above, I find that the Complainants have standing to bring a complaint challenging the utilities' rates and practices under the Commission's rules of practice and procedure, and that at least some of the relief requested in the complaint falls within the scope of the Commission's jurisdiction, and is not pre-empted by federal law. Nevertheless, because of the dual nature of the relief requested in the complaint, both a Commission-initiated investigation and a complaint-type adjudicatory hearing, and in view of the Complainants' professed reluctance to assume the burden of proof associated with a complaint case, and lack of detailed factual allegations in the complaint, I recommend that the complaint in this matter be treated as a petition,

addressed to the Commission's discretion rather than a formal petition for an adjudicatory hearing. In making this recommendation, consistent with Rule R 460.17507, I also recommend that the Commission make clear that Complainants may amend and refile their complaints, separately against any of the individual utilities they choose to identify, setting forth specific factual allegations from which the Commission can conclude that utilities rates are unjust and unreasonable or that the utilities' conduct has been unreasonable and imprudent with regard to spent nuclear fuel management.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ [digital sigature]
Sharon L. Feldman
Administrative Law Judge

March 7, 2005
Lansing, Michigan
dp

ISSUED AND SERVED: March 10, 2005

[proof of service omitted in this appendix]

APPENDIX X

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

Case No. U-13771

[Filed September 20, 2005]

In the matter of the formal complaint of the Michigan Environmental Council, Public Interest Research Group In Michigan, and Michigan Consumer Federation, for commencement of a generic investigation and contested case, for review and audit of books and records, for establishment of separate additional external nuclear plan site decommissioning trusts, and for adoption of additional ratemaking remedies relating to spent nuclear fuel fees and costs collected in rates by nuclear utilities serving Michigan, including Consumers Energy Company, The Detroit Edison Company, Indiana Michigan Power Company, d/b/a American Electric Power, Wisconsin Electric Power Company, and Wisconsin Public Service Corporation.

At the September 20, 2005 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chairman

Hon. Laura Chappelle, Commissioner
Hon. Monica Martinez, Commissioner

ORDER

Procedural History

On March 23, 2003, this complaint was filed by the Michigan Environmental Council (MEC), the Public Interest Research Group in Michigan (PIRGIM), and the Michigan Consumer Federation (MCF) (collectively the Complainants), naming as respondents utilities that have nuclear power facilities that serve Michigan customers, and seeking relief on various issues related to spent nuclear fuel (SNF).

On May 30, 2003, The Detroit Edison Company (Detroit Edison), Consumers Energy Company (Consumers), Indiana Michigan Power Company, d/b/a American Electric Power (I&M), Wisconsin Electric Power Company (Wisconsin Electric), and Wisconsin Public Service Corporation (WPS Corp) (collectively the Respondents),[1] filed five separate motions to dismiss pursuant to R 460.17513. The motions to dismiss are based on the following: (1) lack of standing; (2) failure to state a *prima facie* case; (3) failure to conform to Commission rules; (4) lack of subject matter

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[1] The five nuclear power plants located in Michigan are Big Rock Point (Consumers), Palisades (Consumers), Donald C. Cook 1 and 2 (I&M), and Fermi 2 (Detroit Edison). These plants are currently storing their own SNF. The Wisconsin Electric and WPS Corp nuclear power plants are located in Wisconsin, and none of the SNF from those plants is stored in Michigan.

jurisdiction; and (5) failure to state a claim upon which relief may be granted because Complainants' requested relief is (a) an impermissible invasion of management prerogatives, (b) beyond the scope of a complaint proceeding, (c) prohibited retroactive ratemaking, (d) properly brought in an annual power supply cost recovery (PSCR) plan and reconciliation proceeding, and (e) prohibited by 1982 PA 304. I&M alleges additionally that the relief requested is moot. I&M also moves, in the alternative, for nonjoinder on the same grounds.

The Complainants filed a response in opposition to all of the motions on July 11, 2003. Oral argument took place before Administrative Law Judge Sharon L. Feldman (ALJ) on June 23, 2004.

The ALJ issued a Proposal for Decision (PFD) on March 10, 2005. All of the parties filed exceptions to the PFD on April 7, 2005. All of the parties, as well as the Commission Staff (Staff), filed replies to exceptions on May 26, 2005.

Background

In 1982, Congress adopted the Nuclear Waste Policy Act of 1982 (NWPA), 42 USC 10101 *et seq.*, which confirms and details the federal government's responsibility for the disposal of SNF. The NWPA established a comprehensive program and a schedule for transporting, storing, and disposing of SNF in a deep geologic repository, and provided a mechanism for funding the cost of those activities. The NWPA specifically directed the Department of Energy (DOE) to select a site, obtain a license from the Nuclear

Regulatory Commission (NRC), construct the repository, and begin accepting SNF for disposal by January 31, 1998. To pay for this, the NWPA established the Nuclear Waste Fund (NWF). The NWF is intended to operate on a full-cost recovery basis, whereby the federal government's costs of developing, operating, and closing the repository are to be fully-funded by fees collected from the generators and owners of SNF. These fees are set by the NWPA at 1 mill per kilowatt-hour of electricity generated and sold from each commercial nuclear power reactor. In this way, the ratepayers of nuclear utilities will pay the fees for the waste disposal program through their consumption of nuclear generated electricity. All proceeds from the fees are to be deposited into the NWF.

To implement this funding mechanism, the NWPA authorized the DOE to enter into standard contracts with any utility that generates spent fuel, and the NWPA requires the utilities to sign the standard contracts with the DOE in order to obtain an NRC operating license. 42 USC 10222(a), (b). These standard contracts set the terms for payment into the NWF and contractually obligate the DOE to begin disposing of nuclear waste in accordance with the terms of the NWPA. 10 CFR 961.2.

The Commission established a policy for nuclear decommissioning funding in 1986. *See,* August 26, 1986 order in Case No. U-6150. The Commission has also approved charges over the years for SNF disposal fees as part of rates. *See,* July 31, 1978 order in Case No. U-5331, May 18, 1983 order in Case No. U-6923, and February 17, 1982 order in Case No. U-6927. For

I&M, the Commission approved a settlement agreement that established an external trust fund for these fees. *See,* December 20, 1983 order in Case No. U-7219. Utilities pay an SNF disposal fee to the federal government pursuant to 42 USC 10222(a)(2) and the DOE standard contract, which has been inCorporated into their PSCR clauses pursuant to MCL 460.6j(2) and Commission orders.

In 1987, Congress amended the NWPA, and selected the repository site of Yucca Mountain, Nevada. In 1987, the DOE also extended its estimate for the repository's availability to 2003. In 1989, the DOE stated that the earliest that it would be able to begin accepting SNF would be 2010, and in 1995 it revised this estimate to 2015. In June 1995, Michigan led numerous state utility regulatory agencies and Attorneys General in a lawsuit filed in the U. S. Court of Appeals for the District of Columbia Circuit, seeking enforcement of the DOE's obligations under the NWPA. In July 1995, this lawsuit was consolidated by the court with numerous other state and utility lawsuits. In all, 73 petitioners, including 40 state agencies from 29 states, 8 municipal utilities, and 25 investor-owned utilities, joined in the lawsuit against the DOE.

In July 1996, the Court issued its decision, supporting the petitioners' reading of the NWPA. The Court held that the NWPA "creates an obligation in the DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998." *Indiana Michigan Power Co* v *DOE*, 319 US App DC 209, 214; 88 F3d 1272, 1277 (1996). However, the DOE has defaulted on this obligation. No interim,

let alone permanent, repository has been built, and there appears to be none in sight.[2] The Commission has continued to allow the utilities to recover costs computed in accordance with the NWPA, notwithstanding the fact that the federal government failed to meet the 1998 deadline for SNF disposal. In the meantime, the Respondent utilities incur costs (passed on to ratepayers) to store SNF on-site.

Several courts have found that the DOE has breached the standard contracts.[3] The NWF continues

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[2] *See, also, Maine Yankee Atomic Power Co* v *US*, 225 F3d 1336, 1342 (Fed Cir 2000) (finding the DOE in breach of the standard contract and noting that there are no schedules containing specific dates for disposing of any SNF, and finding it uncertain when they will be adopted and to what extent, if any, they will, or could effectively reflect the breach of the contract); *Nuclear Energy Institute, Inc* v *EPA*, 362 US App DC 204, 210; 373 F3d 1251, 1257 (2004) (finding the 10,000 year compliance period incorporated into the plans for Yucca Mountain to be in violation of the requirements of the Energy Policy Act); *Northern States Power Co* v *US*, 224 F3d 1361, 1366 (Fed Cir 2000) (finding the DOE in breach of the standard contract and precluding the DOE from excusing its own delay on the grounds that it has not yet prepared a storage facility of any kind). The Commission has previously sought comment on the problems associated with the government's apparent default and the ongoing payments to the NWF in it January 28, 1997 order in Case No. U-11314, and the comments and other information submitted in that docket are incorporated by reference in the new matter that the Commission opens today, Case No. U-14559.

[3] One U.S. District Court judge recently held that the prospect of a federal repository appears so unlikely, that she issued an order to show cause why she should not find the standard contract void

to grow, as does the SNF stockpile in each state that hosts a nuclear power plant. As Commissioner Chappelle stated in her testimony before the Subcommittee on Energy and Air Quality, U. S. House of Representatives, April 18, 2002, "passing the costs of the NWF on to the ratepayers has been the only aspect of the NWPA to begin on schedule." Because the NWPA set the policy that disposal of the nation's high-level radioactive waste must be the federal government's responsibility, the utilities must comply. The electric utility ratepayers have upheld their part of the deal. Ratepayers in Michigan have already paid over $450 million into the NWF, and have also had to pay utilities for the cost of additional on-site SNF storage expenses while waiting for the federal repository.

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as a result of mutual mistake in its inception, and order full restitution to be paid to the utility from the NWF, restoring the utility to the same financial position it held as of June 14, 1983 when it entered into the standard contract. *Sacramento Muni Utility Dist (SMUD)* v *US*, -- Fed Cl --, 2005 WL 950500, *2 (Fed Cl April 21, 2005) (No. 98-488C). The court found the DOE's report to Congress indicating that SNF could be shipped to the repository by 2010 not credible. *Id.* The court noted that, for the fiscal year ending September 30, 2003, the NWF had approximately $18 billion in assets; and that, even if all the utilities with currently pending breach of contract actions against the DOE were awarded restitution, the NWF would still have in excess of $10 billion in interest that would continue to accumulate in the fund. *SMUD*, 2005 WL 950500, *2, n. 6.

Proposal for Decision

The ALJ found that the Complainants indicated that they are not prepared to present testimony or other evidence on each issue brought up in the complaint, but they expect the Commission to investigate each issue. The ALJ found the factual allegations in the complaint to be of a general, conclusory nature, not rising to the level of detail required of a formal complaint, and further found that the complaint appeared to be more in the nature of a petition to the Commission to take action to protect ratepayers from the costs associated with SNF.[4] The ALJ found that, in order for the requested remedies to be carried out, the investigation by the Commission must come first.

The ALJ provided an extensive and thorough analysis of the Complainants' standing, and concluded that, under the two-prong test stated in *Ass'n of Data Processing Service Org, Inc* v *Camp,* 397 US 150; 90 S Ct 827 (1970), and pursuant to MCL 462.22(b), the Complainants have standing to bring a complaint challenging the rates and accounting practices of the utilities and seeking a Commission investigation of the expected costs of SNF disposal. *See, also, Friends of the Earth* v *Laidlaw,* 528 US 167; 120 S Ct 693 (2000). The

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[4] The Commission has previously found that the Complainants' proposals for remedying the SNF problem go beyond the scope of a PSCR proceeding or a rate case. *See,* September 16, 2002 order in Case No. U-12725, pp. 30-31; November 20, 2001 order in Case No. U-12615, pp. 15-16; November 20, 2001 order in Case No. U-12613, p. 8-9; and November 23, 2004 order in Case No. U-13808, p. 120.

ALJ provided an equally thorough analysis of the Commission's subject matter jurisdiction, including whether field pre-emption or conflict pre-emption may apply to this matter, and concluded that the NWPA does not pre-empt all Commission jurisdiction to inquire into the extent of, and reasonableness and prudence of, costs incurred or to be incurred by the utilities for SNF handling, storage, and disposal. *See, Pacific Gas & Electric Co* v *State Energy Resources Conservation and Development Comm,* 461 US 190; 103 S Ct 1713 (1983); *Tennessee Valley Authority* v *US,* 60 Fed Cl 665 (2004). The ALJ found that reservation language in the original Atomic Energy Act saves traditional economic regulation for the states, and that the complaint seeks, *inter alia,* economic remedies. 42 USC 2018, 2021(k).

The ALJ further found that the Commission has state statutory authority, pursuant to MCL 460.557 and MCL 462.24, to grant the relief requested, and the subject matter of the complaint falls within the requirements for a proper complaint case. R 460.17501. The ALJ concluded that the Commission has jurisdiction under state law to grant each of the forms of relief requested in the complaint, including the request that Respondents be required to place SNF costs and fees into external trust funds.

Despite these findings on standing and jurisdiction, the ALJ concluded that the complaint fails to make sufficient factual allegations to meet the pleading requirement of R 460.17505 and R 460.17515. The ALJ found that the complaint is best characterized as a petition addressed to the Commission's discretion, based upon the general and conclusory nature of the

allegations. The ALJ found that, while the complaint alleges that the Respondents' rates are unjust and unreasonable, there is no way to determine from the complaint the extent to which the rates are excessive, and the allegations provide no information as to what actions the utilities have taken that have been unreasonable, imprudent, or contrary to their lawful duties. The ALJ found that the complaint failed to identify specific cost items, specific dates, or specific decisions made by any of the Respondents that would allow the Respondents to respond meaningfully to the complaint in order to defend their rates.

The ALJ also found it problematic that the complaint often lumped all of the Respondents together, although they all have separate rate cases, and different decision-making processes. In addition, the ALJ pointed out, the Commission has found that continued payment of SNF fees is not unreasonable, despite the government's ongoing default.

The ALJ found that the complaint does not state a *prima facie* case for the exercise of the Commission's ratemaking jurisdiction, and recommended that the Commission dismiss the complaint without prejudice to the Complainants' ability to file separate complaints with more detailed allegations as to alleged unreasonable or imprudent actions, and/or the specific rate adjustments that need to be made, individually, against each Respondent. The ALJ recommended that the complaint be treated as a petition addressed to the Commission's discretion.

Finally, the ALJ addressed I&M's argument for nonjoinder on the grounds that its factual

circumstances differ from the rest of the Respondents, because its pre-1983 SNF costs are already placed into an external trust; and it has other unique reporting obligations under the Commission's order in Case No. U-7219. The ALJ found that, if she were not dismissing the complaint, she would grant the motion for nonjoinder based upon these differing circumstances.

Exceptions and Replies to Exceptions

1. The Complainants

The Complainants do not agree that the utilities are forced to pay the SNF fee after January 31, 1998. The Complainants argue that the utilities are collecting SNF fees in rates for an SNF program that is in default and is not performing, and they have not undertaken sufficient actions to protect those fees or to seek refunds for ratepayers, or escrow funds, in view of the federal default. The Complainants argue that the previous and ongoing federal court actions brought by various Respondent utilities do not protect the fees that are being collected, or serve to make the funds available in the event that both the utilities and the federal government fail to dispose of the SNF.

The Complainants argue that the ALJ's ruling with respect to the lack of factual specificity in the complaint reflects a medieval concept of pleading inconsistent with modern practice. The Complainants aver that they have given Respondents notice of the nature of their claims sufficient to allow the Respondents to take a responsive position, and, beyond that, the Complainants are entitled to use discovery to

gain further evidence and narrow the issues. The Complainants argue that the ALJ failed to recognize that many of the key facts underlying these issues are known only to the Respondents.

The Complainants contend that the PFD reflects a mistaken impression that the Complainants do not wish to proceed with the litigation as a contested case, but rather wish to hand it over to the Commission. The Complainants state that they do wish to proceed. The Complainants argue that the ALJ's decision results in a denial of the Complainants' notice and hearing rights, as well as their due process and equal protection rights, and that the PFD fits into a pattern of continuous violations of the Complainants' constitutional rights by the Commission. The Complainants further argue that, due to the range and complexity of the subject matter and the number of respondents, the complaint is as specific as the subject matter allows, and is adequate for notice pleading. The Complainants argue that the overall history and context of the litigation of this subject matter is sufficient to apprise the Respondents of the claims against them.

The Complainants argue that the Commission should deny the motions to dismiss and allow the complaint action to commence, should simultaneously commence a proceeding on its own motion by treating the complaint as a petition for an investigation, and should consolidate the two dockets. The Complainants argue that this approach is best because the parties have already expended considerable time and resources on this case, and because the process of filing the case and responding to the motions has resulted in

resolving a number of complex legal issues that relate to the Commission's jurisdiction. In addition, the Complainants argue that they should not be required to refile separate complaints for each utility as this would be a wasted and redundant effort.

2. I&M

I&M argues that, where the complaint fails to state a *prima facie* case, it is improper to address the issues of standing and subject matter jurisdiction, and the ALJ erred in doing so. I&M also excepts to the ALJ's recommendation that the complaint be treated as a petition to the Commission to conduct a generic proceeding on SNF issues. I&M argues that the issues presented by the complaint have been rejected by the Commission before and should not be revisited.

3. Wisconsin Electric and WPS Corp

Wisconsin Electric and WPS Corp argue that the dismissal granted by the ALJ should be with prejudice to filing another complaint regarding these same issues. Wisconsin Electric and WPS Corp argue that the utilities cannot be ordered to provide, at their own expense, performance bonds, standby trusts, liability insurance, or other guarantees, because the Commission does not have the authority to require, as a condition to the collection of PSCR costs reasonably and prudently incurred, the posting of bonds, insurance, or other guarantees. Wisconsin Electric and WPS Corp argue that, because the Complainants have not cited any provision of PA 304 that authorizes such requirements, the ALJ erred in allowing the Complainants to potentially refile these same claims.

Wisconsin Electric and WPS Corp also argue that such a requirement violates the utilities' management prerogatives, and such a program can only be undertaken voluntarily. Wisconsin Electric and WPS Corp further argue that the placement of restrictions on revenues previously collected pursuant to Commission approved final rates would be unlawful retroactive ratemaking.

Wisconsin Electric and WPS Corp argue that the allegations in the complaint are not within the scope of a complaint proceeding as defined in Rule 501. Wisconsin Electric and WPS Corp argue that the Complainants conducted full discovery in Case No. U-12613, and therefore have no basis for the claim that they lack access to information that would allow them to include specific allegations in the complaint, or that additional discovery is necessary for them to be able to set forth such facts. Wisconsin Electric and WPS Corp point out that the Complainants had access to facts sufficient to pre-file expert testimony in this case, and to provide similar expert testimony in other cases on several occasions.

Wisconsin Electric and WPS Corp point out that the Commission has rejected the claim that incurring the cost for interim on-site storage of SNF is unreasonable or imprudent (September 16, 2002 order in Case No. U-12725, p. 30), and the Commission has rejected the claim that a utility has acted unreasonably or imprudently in not taking other unidentified action with respect to the DOE (November 20, 2001 orders in Cases Nos. U-12615 and U-12613). Wisconsin Electric and WPS Corp point out that Complainants' exceptions do not identify any

specific allegations in the complaint stating what action any of the utilities imprudently failed to take which would have lowered their rates or their cost of storing and disposing of SNF.

4. Detroit Edison

Detroit Edison argues that the ALJ erred in analyzing standing and jurisdiction, given that the complaint failed to state a *prima facie* case. Detroit Edison points out that the entire complaint is based on the speculative supposition that the DOE will permanently default on its SNF obligations, and that such speculative harm cannot be the basis for the Complainants' standing.

Detroit Edison urges the Commission not to treat the complaint as a petition, on grounds that all of these claims have been previously rejected. Detroit Edison argues that it is beyond dispute that it was reasonable and prudent for the company to pay its federally-mandated SNF fees rather than risk losing its Fermi 2 license. Detroit Edison points out that it sued the DOE in 1995, 1997, and 2002 over SNF issues.

Detroit Edison also asserts that federal law requires the company to pay SNF fees and costs, and that requirement is statutory as well as contractual. 42 USC 10222(a)(2), (a)(3). Detroit Edison argues that the Complainants propose that the Commission should hold the Respondents responsible in the event that the DOE never constructs a repository, which is both speculative and beyond the Respondents' control. Further, Detroit Edison points out, SNF will not be

accepted by the DOE unless the owner of the waste has been and remains under contract with the DOE. 42 USC 10222(b). Detroit Edison cites to the many cases that have found, under different factual scenarios, that federally mandated charges that a utility is required to pay must be treated as reasonably-incurred operating expenses. Detroit Edison avers that the principle of federal preemption precludes the Commission from disallowing the Respondents' federally mandated fees and costs. Detroit Edison further argues that the relief sought by the Complainants would result in an unconstitutional taking, as such costs cannot be conditioned on the DOE's future success.

5. Consumers

Consumers argues that the ALJ erred in addressing the issues of standing and jurisdiction, because the complaint fails to state a *prima facie* case. For the same reason, Consumers argues that the ALJ erred in recommending that the complaint be treated as a petition.

Consumers argues that Rule 501 provides an additional basis for dismissal of the complaint, and that the ALJ erred in failing to dismiss on these grounds. Consumers argues that the issues identified in the complaint show the Complainants' dissatisfaction with the federal government, but do not meet the rule's standards. Consumers points to the several PSCR and/or rate proceedings in which the Commission has previously rejected the Complainants' arguments.

Consumers further argues that the Complainants lack standing under the two-prong test, since the injury Complainants refer to is speculative. Consumers also argues that Complainants fail to meet the zone of interest prong of the standing test, because there is no statutory basis on which the Commission can force the federal government to live up to its obligations, nor any way for the Commission to lawfully direct the utilities to violate federal law by stopping payments. Consumers further argues that any order by the Commission to the utilities requiring them to place the SNF fees into an escrow account in lieu of paying them to the NWF unlawfully interferes with the utilities' right to make management decisions.

6. The Staff

The Staff filed replies to the Respondents' exceptions as they related to the Commission's jurisdiction and the argument that the Commission lacks the authority to grant the relief requested by the complaint. The Staff agrees with the ALJ and argues that the Commission has broad authority to evaluate the reasonableness and prudence of a utility's conduct, and has jurisdiction to grant relief through the use of its investigative and ratemaking authority, citing to the statutory language of MCL 460.55, 460.56, 460.58, 460.556, 460.557 and 462.28a.

Discussion

In its February 28, 2005 order in Case No. U-13917, p. 11, the Commission stated:

> The Commission remains convinced that the efforts of the MEC/PIRGIM to interject broad based SNF issues into various types of individual contested cases is misplaced. In its November 20, 2001 orders in Cases Nos. U-12613 and U-12615, the Commission rejected similar efforts by MEC/PIRGIM to interject SNF issues into PSCR proceedings. In so doing, the Commission recognized that the SNF disposal issues confronting the electric utility industry are significant and that a solution will not be implemented any time soon. However, the Commission found that the MEC/PIRGIM's proposals did not have much bearing on the reasonableness or prudence of a utility's management. The Commission expressed its belief that (1) the problem was much larger than any individual utility's nuclear operation, (2) feasible alternatives to the construction of a permanent repository are not readily apparent, and (3) the Commission is unable to find that individual utilities are acting imprudently.

The Commission has rejected the claim that the continued payment of the federal SNF fee after January 31, 1998 is unreasonable or imprudent; and has recognized that to unilaterally cease payment into the NWF jeopardizes the utilities' rights under the standing contracts and hence rights to store SNF at any federal repository, and could result in the nonrenewal of the utility'snuclear power plant license and thus impede the utility's ability to provide electricity. April 28, 2005 order in Case No. U-13919, pp. 8-11. The Commission has also rejected the claim that incurring the cost for interim on-site storage of

SNF is unreasonable or imprudent (September 16, 2002 order in Case No. U-12725, p. 30), and the claim that a utility has acted unreasonably or imprudently in not taking other unidentified action with respect to the DOE (November 20, 2001 orders in Cases Nos. U-12615 and U-12613). The Commission's conclusions in Cases Nos. U-12613, U-12614, U-12615, U-12725, U-13917 and U-13919 are applicable in the present proceeding, and preclude most of the relief sought. Additionally, other states are similarly situated to Michigan with regard to ongoing payments into the NWF. To the Commission's knowledge, no state has granted the type of relief sought by MEC/PIRGIM in this case – indeed, there is none cited in the complaint or in the briefing on the motions.

However, as an initial matter, the Commission is not persuaded that the overall history and context of litigation can act as a substitute for allegations. Rule 501 provides that a complaint is limited to matters involving alleged unjust, inaccurate, or improper rates or charges or unlawful or unreasonable acts, practices, or omissions of a utility, and Rule 505 requires specific allegations. R 460.17501, 460.17505. Complainants have not alleged any specific unreasonable or imprudent action or omission on the part of the named utilities that resulted in unjust or excessive rates. The Commission finds that the complaint does not meet the criteria specified in Rules 501 and 505. The Commission agrees with the ALJ and adopts her recommendation that the motions to dismiss for failure to state a *prima facie* case be granted, without prejudice to refiling the complaint. The Commission does not find that five separate complaints must be filed. However, the Commission does order that any

refiled complaint must meet the criteria specified in Rules 501 and 505 with regard to the specificity of pleading, and must make allegations specific to each respondent company (i.e., recognize that certain claims are moot with respect to I&M because it has already established external trusts, and other claims are inaccurate with respect to Detroit Edison because it has no pre-1983 SNF costs). Finding that the complaint fails to state a *prima facie* case, the Commission declines to address any of the other issues raised by the motions.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 *et seq.*; 1919 PA 419, as amended, MCL 460.51 *et seq.*; 1939 PA 3, as amended, MCL 460.1 *et seq.*; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*

b. The complaint of the Michigan Environmental Council, the Public Interest Research Group in Michigan, and the Michigan Consumer Federation should be dismissed for failure to state a *prima facie* case, without prejudice to refiling, consistent with this order.

THEREFORE, IT IS ORDERED that the complaint of the Michigan Environmental Council, the Public Interest Research Group in Michigan, and the Michigan Consumer Federation is dismissed for failure to state a *prima facie* case, without prejudice to refiling, consistent with this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC
SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

(SEAL)

/s/ Laura Chappelle
Commissioner

/s/ Monica Martinez
Commissioner

By its action of September 20, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*

b. The complaint of the Michigan Environmental Council, the Public Interest Research Group in Michigan, and the Michigan Consumer Federation should be dismissed for failure to state a *prima facie* case, without prejudice to refiling, consistent with this order.

THEREFORE, IT IS ORDERED that the complaint of the Michigan Environmental Council, the Public Interest Research Group in Michigan, and the Michigan Consumer Federation is dismissed for failure to state a *prima facie* case, without prejudice to refiling, consistent with this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC
SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

/s/ Laura Chappelle
Commissioner

/s/ Monica Martinez
Commissioner

By its action of September 20, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

[proof of service omitted in this appendix]

APPENDIX Y

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

Case No. U-13771

[Filed February 9, 2006]

In the matter of the formal complaint of the Michigan Environmental Council, Public Interest Research Group In Michigan, and Michigan Consumer Federation, for commencement of a generic investigation and contested case, for review and audit of books and records, for establishment of separate additional external nuclear plan site decommissioning trusts, and for adoption of additional ratemaking remedies relating to spent nuclear fuel fees and costs collected in rates by nuclear utilities serving Michigan, including Consumers Energy Company, The Detroit Edison Company, Indiana Michigan Power Company, d/b/a American Electric Power, Wisconsin Electric Power Company, and Wisconsin Public Service Corporation.	))))))))))))))

At the February 9, 2006 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chairman

Hon. Laura Chappelle, Commissioner
Hon. Monica Martinez, Commissioner

OPINION AND ORDER

Procedural History

On March 23, 2003, the Michigan Environmental Council, the Public Interest Research Group in Michigan, and the Michigan Consumer Federation (collectively, the Complainants) filed a complaint seeking relief on various issues related to spent nuclear fuel (SNF). The Complainants named as respondents utilities that have nuclear power facilities that serve Michigan customers.

On May 30, 2003, The Detroit Edison Company (Detroit Edison), Consumers Energy Company (Consumers), Indiana Michigan Power Company, d/b/a American Electric Power (I&M), Wisconsin Electric Power Company (Wisconsin Electric), and Wisconsin Public Service Corporation (WPS Corp) (collectively, the Respondents),[1] filed five separate motions to dismiss pursuant to R 460.17513.

The Complainants filed a response in opposition to the motions on July 11, 2003. Oral argument took

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[1] The five nuclear power plants located in Michigan are Big Rock Point (Consumers), Palisades (Consumers), Donald C. Cook 1 and 2 (I&M), and Fermi 2 (Detroit Edison). These plants are currently storing their own SNF. The Wisconsin Electric and WPS Corp nuclear power plants are located in Wisconsin, and none of the SNF from those plants is stored in Michigan.

place before Administrative Law Judge Sharon L. Feldman (ALJ) on June 23, 2004.

The ALJ issued a Proposal for Decision (PFD) on March 10, 2005. All of the parties filed exceptions to the PFD on April 7, 2005. The Complainants, the Respondents, and the Commission Staff (Staff) filed replies to exceptions on May 26, 2005. On September 20, 2005, the Commission issued an order dismissing the complaint, without prejudice, for failure to state a *prima facie* case. The Commission observed that under 1999 AC R 460.17501 (Rule 501) and 1999 AC R 460.17505 (Rule 505), a complaint brought before the Commission is limited to matters involving alleged unjust, inaccurate, or improper rates or charges or unlawful or unreasonable acts, practices, or omissions of a utility and that specific allegations of the same must be made. The Commission found that the Complainants had failed to meet the requirements of Rule 501 and Rule 505.

On October 25, 2005, the Complainants filed a petition for rehearing and reconsideration under 1923 PA 94, MCL 460.351 *et seq.*, and 1999 AC R 460.17401 (Rule 401) and R 460.17403 (Rule 403). The Complainants argue that the Commission misconstrued Rules 501 and 505 and had therefore improperly dismissed their complaint. On November 10, 2005, the Respondents and the Staff filed answers opposing the request for rehearing.

Positions of the Parties

The Complainants argue that in dismissing their complaint, the Commission failed to follow the

Michigan Court Rules, which are incorporated by reference into the Commission's Rules of Practice and Procedure. The Complainants claim that their complaint was as specific as the subject matter permits and that the matters alleged gave adequate notice to the Respondents of the Complainants' claims. The Complainants conclude that, contrary to the Commission's finding, the complaint stated a *prima facie* case.

The Complainants further argue that the Commission's dismissal of the complaint, without providing any alternative action or relief, was error and constituted a failure by the Commission to uphold its ratemaking duties. The Complainants cite *City of Detroit* v *Public Service Comm*, 308 Mich 706; 14 NW2d 784 (1944), in support of their claim. The Complainants argue that under *City of Detroit*, the Commission cannot abdicate its duty to balance the interests of ratepayers with those of shareholders regarding the payment of SNF costs.

The Complainants argue that the Commission's dismissal of the case was unreasonable, in light of the long history of the case and the fact that several of the key SNF issues were in fact addressed by the ALJ after briefing and arguments. Rather than dismissing the complaint, the Complainants assert that the Commission should either provide more guidance on the proper forum for addressing SNF issues or, alternatively, apply Michigan's liberal rules for amendment of complaints.

Finally, the Complainants claim that their petition for rehearing meets the criteria under Rule 403

because they provided additional evidence that ratepayers are paying fees for SNF disposal while the federal government remains in breach of its contract with the utilities to receive and dispose of SNF. Moreover, the Complainants assert that after this case was filed the utilities have continued in their failure to take reasonable actions to enforce the SNF contracts with the federal government. The Complainants conclude that this additional evidence provides a clear basis for the Commission to reverse its order and reinstate the Complainants' case.

The Respondents and the Staff argue that the petition for rehearing fails to meet the standards for rehearing under Rule 403, that the Complainants have merely restated the same arguments already considered and rejected by the Commission, and that the Complainants simply disagree with the Commission's decision to dismiss the complaint.

Discussion

Rule 401 of the Commission's Rules of Practice and Procedure, 1999 AC, R 460.17401, provides that a proceeding may be reopened for the purpose of receiving new or additional evidence to complete the record or if there has been a change in fact or law such that the public interest is served by reopening the proceeding. Because the complaint was dismissed on its face, the Commission finds that Rule 401 is inapplicable here.

Rule 403 of the Commission's Rules of Practice and Procedure, 1999 AC, R 460.17403, provides that a petition for rehearing may be based on claims of error,

newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. A petition for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing.

The Commission finds that the Complainants have failed to present new evidence, or a change of law or fact that would justify rehearing. The Complainants' substantive arguments are essentially the same as those made in their initial brief, most which were repeated thereafter in their exceptions to the PFD. Because the Complainants have made no convincing claim of error, the Commission finds that their petition demonstrates no grounds for rehearing.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 *et seq.*; 1919 PA 419, as amended, MCL 460.51 *et seq.*; 1939 PA 3, as amended, MCL 460.1 *et seq.*; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*

b. The petition for rehearing filed by the Complainants should be denied.

THEREFORE, IT IS ORDERED that the petition for rehearing filed by the Michigan Environmental Council, the Public Interest Research Group in Michigan, and the Michigan Consumer Federation is denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC
SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

(SEAL)

/s/ Laura Chappelle
Commissioner

/s/ Monica Martinez
Commissioner

By its action of February 9, 2006.

/s/ Mary Jo Kunkle
Its Executive Secretary

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC
SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

/s/ Laura Chappelle
Commissioner

/s/ Monica Martinez
Commissioner

By its action of February 9, 2006.

/s/ Mary Jo Kunkle
Its Executive Secretary

[proof of service omitted in this appendix]

APPENDIX Z

NUCLEAR WASTE FUND PAYMENT INFORMATION BY STATE THROUGH Q3 FY 2007 (MILLION DOLLARS)

[Fold-out exhibit, see next page]

Nuclear Waste Fund Payment Information by State through Q3 FY 2007 (Million Dollars)

NEI NUCLEAR ENERGY INSTITUTE

State	Total NWF Contributions	One-Time Fee Outstanding	Allocation of Interest on NWF	Total Liabilities
Alabama	684.1	0.0	515.1	1,199.2
Arizona	483.4	0.0	364.0	847.4
Arkansas	271.6	173.0	204.5	649.1
California	764.2	0.0	575.3	1,339.5
Colorado	0.2	0.0	0.2	0.4
Connecticut	337.1	459.4	253.8	1,050.4
Florida	716.7	0.0	539.6	1,256.3
Georgia	630.9	0.0	475.0	1,105.8
Illinois	1,617.2	974.0	1,217.5	3,808.7
Iowa	103.7	0.0	78.1	181.8
Kansas	172.0	0.0	129.5	301.6
Louisiana	294.8	0.0	221.9	516.7
Maine	65.5	177.4	49.3	292.2
Maryland	329.5	0.0	248.0	577.5
Massachusetts	151.7	0.0	114.2	265.9
Michigan	473.7	409.3	356.7	1,239.7
Minnesota	363.3	0.0	273.5	636.9
Mississippi	185.0	0.0	139.3	324.3
Missouri	178.3	0.0	134.3	312.6
Nebraska	242.2	0.0	182.4	424.6
New Hampshire	136.3	0.0	102.6	238.8
New Jersey	544.5	166.9	410.0	1,121.4
New York	721.5	483.6	543.2	1,748.2
North Carolina	763.8	0.0	575.1	1,338.9
Ohio	273.3	31.2	205.8	510.3
Oregon	75.5	0.0	56.9	132.4
Pennsylvania	1,428.4	85.0	1,075.4	2,588.8
South Carolina	1,147.6	0.0	864.0	2,011.6
Tennessee	413.4	0.0	311.3	724.7
Texas	540.2	0.0	406.7	947.0
Vermont	85.3	138.3	64.2	287.9
Virginia	645.8	0.0	486.2	1,132.1
Washington	144.9	0.0	109.1	254.0
Wisconsin	331.8	0.0	249.8	581.6
Other	7.6	0.0	5.7	13.2
Total	15,325.0	3,098.3	11,538.1	29,961.4

Source: Department of Energy

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No. 08-246

FILED
SEP 25 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

MICHIGAN ENVIRONMENTAL COUNCIL,

Petitioner,

v.

MICHIGAN PUBLIC SERVICE COMMISSION AND INDIANA MICHIGAN POWER COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The Michigan Court Of Appeals

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Michigan law requires that electric utilities, such as Respondent Indiana Michigan Power Company (I&M), file annual Power Supply Cost Recovery (PSCR) cases before the Michigan Public Service Commission (MPSC). The MPSC approves the utility's recovery of its costs for purchasing and generating electricity, to the extent that those costs are reasonable and prudent. One of I&M's costs is the payment of spent nuclear fuel (SNF) fees to the Department of Energy (DOE) for the disposal of SNF from its nuclear plant.

Against this backdrop, the question presented is:

Whether the MPSC opinion and order, that allowed I&M to recover the SNF fee costs under Michigan's PSCR law, based on a finding that it was reasonable and prudent for I&M to continue payment of SNF fees to avoid risking severe consequences, such as the loss of its license to operate its nuclear plant, presents a question of federal preemption such that this Court should grant the Petition for a Writ of Certiorari.

RULE 29.6 DISCLOSURE STATEMENT

Indiana Michigan Power Company is wholly-owned by American Electric Power Company, Inc. American Electric Power Company, Inc.'s stock is publicly-traded.

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INTRODUCTION

The Petition presents no sound basis for this Court to exercise jurisdiction. The Petition is based entirely on an alleged federal preemption issue that neither the Michigan Public Service Commission (MPSC) nor the Michigan Court of Appeals decided. The MPSC and Michigan Court of Appeals properly applied Michigan law to the facts of this case and did not decide any federal question – let alone an important one that would merit this Court's review.

In an effort to make a case otherwise, Petitioner fashions new versions of the MPSC and Michigan Court of Appeals decisions to self-create a federal question. But Petitioner does so based on remarkable misstatements of fact and law, which bear no resemblance to what was actually decided. Petitioner disregards the simple fact that the MPSC and Michigan Court of Appeals decided the question of recovery of spent nuclear fuel (SNF) fee costs in Respondent Indiana Michigan Power Company's (I&M) utility rates on the basis of *state law*. Neither the agency nor the Court decided the case on the basis of federal preemption concerning utility payment of SNF fees.

For example, Petitioner contends that the MPSC and Michigan Court of Appeals decisions contradict decisions of this Court and other federal courts by erroneously holding that the SNF fee is mandated by 42 U.S.C. §10222, and disregarding the reciprocal obligation between payment of the fee in exchange for the Department of Energy (DOE) commencing

disposal of SNF by January 31, 1998. Petitioner contends that because the DOE has breached its disposal obligation, utilities are no longer obligated to pay the SNF fee; and therefore the MPSC should have found I&M to be unreasonable and imprudent in continuing to pay the fee. Petitioner contends the MPSC and Court of Appeals found that federal law preempted the disallowance of cost recovery and other "remedies" Petitioner sought. These supposed errors finding federal preemption are said to have significant national importance and to have improperly constrained the MPSC's ratemaking authority.

In reality, and as revealed by an accurate review of this case, there is no question of federal preemption that was decided below, nor is one appropriately presented for review (in the first instance) by this Court. The decisions below were decided properly – and only – based on the evidentiary record and state law. The MPSC and Court of Appeals did make statements concerning the SNF fee being mandated by 42 U.S.C. §10222, but there is no merit in Petitioner's attempt to read those statements out of context. Those statements are part of a complete analysis concerning the risks and consequences that I&M would face (such as the loss of its license to operate its nuclear plant) if it were to stop paying the SNF fee based on Petitioner's legal theory that I&M does not really have to pay the fee. The MPSC and the Court observed that Petitioner's theory is contrary to plain statutory language, and based their decisions on the record, which included qualified

expert and factual testimony[1] that (1) the Nuclear Waste Policy Act of 1982, 42 U.S.C. §10101 *et seq.* (NWPA) established that the Federal government would provide for the permanent disposal of SNF, (2) the DOE entered into standard contracts for the disposal of SNF, which standard contracts provide for a fee to be paid by utilities generating SNF, (3) I&M had no practical alternative other than to sign the standard contract, and (4) under the terms of the standard contract, I&M's late payment or nonpayment creates the risk of interest charges, contract suspension, loss of priority when DOE starts taking SNF for disposal, and adverse consequences for maintaining or renewing I&M's nuclear plant operating license. The MPSC found that it was reasonable and prudent based on the record and under Michigan law, for I&M to continue paying SNF fees in light of

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[1] At page 3 of its Petition, Petitioner claims that it has consistently presented substantial expert evidence and briefing demonstrating that utilities have failed to carry their burden to establish reasonableness and prudence. Later, Petitioner repeats its claim that the testimony of I&M's witness is improper legal opinion. Both of these claims were rejected by the Administrative Law Judge who presided over the evidentiary hearings, and by the MPSC. These evidentiary claims were unavailing when also made to the Michigan Court of Appeals and the Michigan Supreme Court. The Petitioner's stubborn but misguided assertions concerning evidence now made to this Court merely reflect Petitioner's refusal to accept the fact that the proper authorities considered and weighed the evidence, and found I&M's evidence to be more compelling than the evidence of Petitioner's witness. As such, these claims present no justification for this Court to exercise jurisdiction.

the risks of nonpayment. The MPSC did not decide its authority to disallow SNF fees was federally preempted.[2] The Michigan Court of Appeals recognized that the MPSC did not decide the question of federal preemption, and similarly declined to decide it (13a, n 5: "Appellants argue that federal law does not preempt the PSC's ratemaking powers over SNF fees. We need not consider this argument because the PSC did not rely on the doctrine of federal preemption").

Petitioner's claim that this case has national significance is misguided. This case is and has been one of Michigan law with no question of federal law decided. Petitioner's misstatements regarding the record and the decisions below, which form the basis of Petitioner's request, are erroneous and no major lingering preemption issue is faced or need be resolved here.

A key issue in a Michigan PSCR plan case is whether the utility's PSCR plan is reasonable and prudent. Petitioner merely wishes to substitute its judgment concerning what is "reasonable and prudent" for that of the MPSC – essentially that I&M should stop paying the SNF fee based on Petitioner's legal theory, instead of paying the fee and thereby avoiding the risks of severe consequences, as demonstrated on

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[2] In fact, at one point in its argument Petitioner asserted that the MPSC lacks the ability to make such determination because as a state agency it may not decide Constitutional questions.

the record. Based on a full and complete evidentiary record, the MPSC determined that I&M's 2004 PSCR plan was reasonable and prudent (37a). This case has been properly decided by the MPSC, and the MPSC's decision was affirmed by the Michigan Court of Appeals based on Michigan law. There is no merit in Petitioner's attempt to elicit this Court's assistance by crafting a federal question when one is not present. There is no significant public interest issue at stake here, aside from the false apparition of preemption that Petitioner insists hangs over this case.

The only confusion and uncertainty which arises from the decisions below is that artificially created by Petitioner's misstatements. This Court's decisions and those of other federal courts are not implicated. The safeguards and policy questions Petitioner wishes answered are not ripe in this case.

None of the criteria warranting this Court's review are present, so the Petition should be denied.

COUNTERSTATEMENT OF THE CASE

I. BACKGROUND AND SUMMARY OF THE DECISIONS BELOW.

I&M owns and operates the Donald C. Cook Nuclear Generating Plant, which supplies electricity to Michigan customers. In 1983, I&M entered into a standard contract with the DOE, in accordance with NWPA. Under the contract, I&M pays a fee to the

DOE in support of a federal SNF disposal program. This program was scheduled to begin no later than January 31, 1998. SNF disposal did not begin as scheduled, but the DOE maintains that it will begin eventually. For purposes of ratemaking in Michigan, I&M's SNF fee is classified as a nuclear fuel expense and is included as a power supply cost reflected in I&M's PSCR plan.

Michigan law provides for PSCR plans. MCL 460.6j, added by 1982 PA 304 ("Act 304"), authorizes the MPSC to include a PSCR clause in a utility's rate schedule. A PSCR clause allows a utility to charge customers for the anticipated costs associated with the supply of power. Annually, a utility files a PSCR plan. See MCL 460.6j(3). The MPSC may approve, disapprove, or modify the proposed PSCR plan. The Petition arises from the MPSC approval of I&M's 2004 PSCR plan, which the Michigan Court of Appeals affirmed.[3]

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[3] Petitioner also references a number of other cases, which are irrelevant because Petitioner does not seek review of those cases. Petitioner's description of those cases is also misleading because it is inaccurate and incomplete. Notwithstanding Supreme Court Rule 15.2, I&M declines to burden the Court with a lengthy recitation of corrections to Petitioner's countless (and ultimately irrelevant) misstatements about other decisions, which speak for themselves and reveal Petitioner's inaccuracies. For example, Petitioner complains that the MPSC dismissed its generic complaint in Case No. U-13771, and suggests that it has no forum to present is position (Petition, p 17, n 10 and p 25) but review of the MPSC's decision reveals that the MPSC dismissed

(Continued on following page)

On September 30, 2003, I&M filed an application and supporting materials for MPSC approval of its PSCR plan and factors for the 12 months ending December 2004. On November 25, 2003, Petitioner was permitted to intervene.

An evidentiary hearing was conducted on March 10, 2004, during which I&M offered testimony from five witnesses, and Petitioner presented testimony from one witness. The resultant record consists of 252 pages of transcript and 32 exhibits, 30 of which were received into evidence.

Petitioner made its direct case through the testimony of Ronald C. Callen, a consultant. Mr. Callen testified that although utilities with nuclear plants have long been required to contribute funds to the DOE for construction of a national SNF repository, little progress has been made toward opening such a facility. He further testified that, as a result, utilities like I&M are bearing the cost of storing SNF on site while concurrently paying for federal disposal facilities that have not yet begun to accept SNF.

Mr. Callen stated, in his opinion, insufficient support existed for including as part of I&M's 2004 PSCR factors, the DOE's one mill per kilowatt-hour (kWh) SNF disposal fee. He concluded that I&M had not been reasonable and prudent regarding its

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the complaint, without prejudice, due to the failure to even state a *prima facie* case (591a).

ongoing payment of the fee because it failed to "undertake necessary or sufficient action to mitigate or minimize these costs, or to seek protections of the amounts" provided to the DOE in response to those SNF-related assessments.

In rebuttal, I&M presented Douglas H. Malin, Manager of its Nuclear Fuel Section, who addressed I&M's payment of SNF fees and actions with respect to the DOE contract:

> "The standard contract with the DOE is also embodied in 10 CFR, Part 961. Any late payment or nonpayment would result in interest charges and possible contract suspensions and not relieve I&M's obligation to make payment of required fees. Clearly, **I&M is obligated to make payments to the DOE** for post-April 7, 1983 SNF fees **or run the risk of severe consequences**."

Mr. Malin also elaborated on cross-examination by Petitioner's counsel:

> "I can't speak to Mr. Callen's testimony. With respect to this rebuttal document, there is what is known as a viability assessment, it's performed by the Nuclear Regulatory Commission – I don't know chapter and verse, statutes, et cetera – but essentially it says, **if you do not have a place to put your spent nuclear fuel, you do not have, or will not have a license to operate a facility that brings electricity to the community.**

"To date, the only acceptable source to permanently store nuclear fuel as part of this viability assessment, is the Department of Energy; there are no other facilities, and this is what is accepted by the Nuclear Regulatory Commission.

"Q. But you are trying to rebut Mr. Callen's testimony. Would you agree that Mr. Callen has not suggested anywhere that you should not have signed the standard contract?

"A. I can't speak to Mr. Callen's opinion, the point being that later on in this answer, we talk – page 3, line 2, illustrates that the government has this responsibility, all the utilities entered into contract, everyone had to sign later that contract is in 10 CFR, Part 961, I think that's the law, **we don't want to make late payments because it would result in interest charges. DOE could suspend the contract, it wouldn't relieve us of the obligation and we would run the risk of severe consequences and that includes the viability determination by the Nuclear Regulatory Commission, the continuance of our operating license and the operation and benefit of the facility,** that's why I answered the question this way."

Mr. Malin also explained the consequences of nonpayment of SNF fees:

"I recall some parts of his testimony which involve not paying fees to the Department of Energy which would be in violation of our

> contract; **it would add nonpayment and interest charges, increasing the costs to the customer**, and it **would risk suspension of the contract**. The contract is very clear." (Emphasis added).

On April 28, 2005, the MPSC approved I&M's 2004 PSCR plan. Nowhere in its decision did the MPSC find that its authority to disallow SNF costs was federally preempted. Instead, the MPSC applied Michigan law to the facts established in the evidentiary record, and concluded:

> "AEP entered into a 'Standard Contract' with the DOE for disposal of SNF. The contract requires SNF storage fee payments to the DOE of 1 mill for each kWh of electricity generated and sold by a nuclear-fueled generating facility. As consideration for the payment received, the DOE was to provide a site for SNF storage by January 31, 1998. The DOE defaulted on its obligation under the contract when it did not provide a place for SNF storage by January 31, 1998. In spite of the DOE's default, I&M continues its payment of SNF fees. I&M included SNF fees of $2,312,250 in its 2004 PSCR costs.
>
> * * *
>
> **"The Commission concludes that I&M has not acted unreasonably or imprudently in its handling of SNF payments. In so doing, the Commission rejects all of MEC/PIRGIM's arguments to the contrary. Nothing in this record persuades**

the Commission that I&M should unilaterally cease its payment of SNF fees to the DOE at this time. To do so might risk consequences, such as the imposition of interest payments levied on unpaid SNF amounts due or suspension of the standard contract, which might mean that I&M may not be able to store SNF at the DOE's repository if it is ever built. A failure to have access to a repository that stores SNF could result in a finding by the NRC that I&M's nuclear plant is not 'viable', and could result in the NRC's nonrenewal of I&M's nuclear power plant license. Obviously, if the NRC does not renew I&M's nuclear power plant license, the utility's ability to provide electricity to its customers would be affected. These types of actions must be more fully examined, preferably in a generic proceeding, to access the risk to the utility, its ratepayers, and the general public.

"**The Commission also disagrees with MEC/PIRGIM's contention that PSCR customers are not responsible for payment of SNF fees.** Act 304 governs the recovery of power supply costs from utility customers. Section 6j(1)(a) of Act 304 allows a utility with a PSCR clause to recover from its customers 'booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility

incurred under reasonable and prudent policies and practices.' MCL 460.6j(1)(a). SNF fees are expenses that result from disposal of nuclear fuel rods that have been used to generate electricity. **Because PSCR costs include disposal costs, and because there has been no showing of unreasonableness and imprudence in I&M's incurrence of SNF fees, the Commission finds that SNF fees are recoverable from its PSCR customers.**

"**Further, the Commission finds that, contrary to MEC/PIRGIM's assertions, the record shows adequate court actions by I&M to address the DOE's default on its obligation to take possession of SNF.** I&M established through federal court litigation that DOE has an unconditional obligation to dispose of SNF. *See, Indiana Michigan Power Co v. Dept of Energy*, 88 F.3d 1272 (1996). After the 1996 court ruling, the DOE informed the parties that it would not accept SNF by January 31, 1998. After being informed of the DOE's refusal to accept SNF, another affected utility sought a writ of mandamus. The Court of Appeals denied in part the writ, and held that the standard contract provided damages as a remedy for the DOE's default. *See, Northern States Power v. Dept of Energy*, 128 F.3d 754 (1997). I&M says that in *Northern States Power*, equitable remedies were denied because the Court found that contract damages were an available remedy for the DOE's default on its obligation under the Standard Contract.

> I&M also says that in *Northern States Power II v. Dept of Energy*, 224 F.3d 1361 (2000) and *Maine Yankee Atomic Power v. United States*, 225 F.3d 1336 (2000), the United States Court of Appeals confirmed that seeking contract damages should be the utility's first response to the DOE's default on its obligation to take possession of SNF. **Because the court actions taken by I&M and other utilities are deemed adequate, no finding of unreasonableness and imprudence can be found based on a failure to seek judicial relief.**" (35a, 37a-39a, emphasis added).

On May 31, 2005, Petitioner petitioned for rehearing, arguing that the evidentiary record did not support a finding of reasonableness and prudence. On August 1, 2005, the MPSC denied Petitioner's request (22a). In so doing, the MPSC did not, as Petitioner misstates, adopt I&M's federal preemption arguments.[4] Instead, the MPSC found that the Petitioner simply rehashed its arguments previously considered by the MPSC, and therefore failed to satisfy the rules for rehearing. Far from adopting I&M's position or finding federal preemption, as Petitioner misstates on

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[4] On page 17 of its Petition, Petitioner misleadingly quotes from that section of the MPSC Order labeled "Position of the Parties". That section of the MPSC order summarizes the positions of the parties and is not the MPSC's decision nor is it an adoption of the parties' positions. In proper context, it is clear that the MPSC order denied rehearing because Petitioner was merely rearguing its position.

page 17 of its Petition, the MPSC rejected the petition for rehearing under well-established procedure because:

> "MEC/PIRGIM makes no effort whatsoever to present new evidence or even a new argument. MEC/PIRGIM cite no change in fact or law. Every substantive argument made by MEC/PIRGIM in their petition was made in their initial brief, and many of them were repeated thereafter in their reply brief, exceptions and replies to exceptions. MEC/PIRGIM make no convincing claim of error. The Commission finds that MEC/PIRGIM's petition demonstrates no grounds for reopening or rehearing and denies the petition." (22a.)

Petitioner appealed and claimed that for numerous reasons the MPSC should have disallowed recovery of the SNF fees paid by I&M. Page 17 of the Petition misstates the record when it asserts that once again I&M advanced its preemption argument. Instead, I&M's brief to the Court of Appeals responded to Petitioner's arguments on federal preemption by pointing out that the MPSC did *not* rely on federal preemption. I&M's total argument concerning federal preemption is contained in the following single paragraph:

> "In Part V, MEC sets up another straw man argument concerning federal preemption. I&M admits that it argued to the Commission that disallowance of SNF costs was federally preempted as a federally mandated

> cost. However, the Commission did not rule on those preemption arguments. Instead, the Commission found that I&M had not acted unreasonably or imprudently in its handling of SNF payments. (Order, p 10). The Commission did not determine that it was bound by the doctrine of federal preemption to allow recovery of the costs. Because federal preemption analysis of I&M was not a basis for the Commission's decision in this case, MEC's argument contained in Part V of its brief is really an academic exercise. Matters not addressed and decided by the Commission as a basis for its decision are not ripe for appellate review. Most certainly, MEC's argument does not rise to the level of showing by clear and convincing evidence that the Commission's decision is unlawful or unreasonable [which is the standard for appellate review of an MPSC decision under Michigan law, MCL 462.26(8)]." (Citations omitted).

On April 24, 2007, the Michigan Court of Appeals affirmed the Commission's orders approving I&M's 2004 PSCR plan.

Petitioner spills considerable ink on the issue of preemption, which is perplexing because neither the MPSC nor the Court of Appeals based their decisions on preemption. Rather, the Court of Appeals first applied the proper Michigan standard of review and found that Petitioner failed to meet it.

> "The standard of review for PSC orders is narrow and well defined. MCL 462.25 provides that all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. A party aggrieved by an order of the PSC has the burden to prove by clear and convincing evidence that the order is unlawful and unreasonable. MCL 462.26(8). To establish that a PSC order it unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. . . . The basis for the PSC's decision is set out clearly in its order approving IMPCo's PSCR plan, and in particular its order denying appellants' petition for rehearing. . . . Appellants have not shown by clear and convincing evidence that the PSC's decision is unlawful or unreasonable." (7a, 10a, 13a).

Petitioner focuses its preemption claims on a single-line statement that federal law mandates the payment of the SNF fee. Petitioner's selective phrasing disguises, but cannot hide the fact that, while the Court of Appeals discussed Petitioner's claims that the MPSC's ratemaking powers were not preempted, the Court did not rely on federal preemption as a basis for its decision.[5] The Court of Appeals determined that

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[5] In fact, a federal preemption issue was not ripe for review because the MPSC did not address the matter. Under Michigan law, matters not addressed and decided by the MPSC as a basis

(Continued on following page)

the MPSC lawfully acted within its Michigan rate-making authority. The Court responded to Petitioner's claims, noting that the "payment of SNF fees by a utility is mandated by 42 U.S.C. §10222." The Court based its decision, however, on its review of the record and Michigan law, explaining:

> "A witness for IMPCo testified that IMPCo's actions with respect to collection of SNF costs from ratepayers and payment of SNF fees to the DOE were reasonable and prudent. The witness noted that (1) payment was required under IMPCo's standard contract with the DOE; (2) IMPCo's decision to pay the fees notwithstanding the federal government's delay in completing a disposal site was consistent with action taken by other utilities; (3) if IMPCo refused to pay the fees it risked losing its license to operate its nuclear power plant; and (4) IMPCo had supported litigation to compel the federal government to fulfill its duties under the NWPA.
>
> "The PSC has the discretion to consider a variety of factors when setting just and reasonable rates, and the authority granted to the PSC is set out in MCL 460.6a and MCL 460.6j. The PSC acted in accordance with this authority and properly concluded that,

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for its decision are not ripe for appellate review, as I&M noted in the above-quoted paragraph from its brief in the Michigan Court of Appeals.

> in the absence of a finding of unreasonable or imprudent conduct on the part of a utility, it lacked the authority to impose the remedies suggested by appellants, including placing the burden of paying SNF fees on IMPCo's stockholders rather than on IMPCo's ratepayers. Appellants have not shown by clear and satisfactory evidence that the PSC's decision is unlawful or unreasonable. MCL 462.26(8)." [12a-13a, Footnotes omitted.]

Petitioner overlooks the above portion of the Court of Appeals' opinion, which plainly sets forth the Court's decision and reasoning. Moreover, Petitioner's arguments ignore that the Court of Appeals followed this portion of its opinion with a footnote expressly declining to address preemption:

> "Appellants argue that federal law does not preempt the PSC's ratemaking powers over SNF fees. *We need not consider this argument because the PSC did not rely on the doctrine of federal preemption.* Moreover, a state utility commission must allow, as a reasonable operating expense, a cost incurred pursuant to a federal statute, *ABATE v. Public Service Comm.*, 192 Mich. App. 19, 22-27; 480 N.W.2d 585 (1981), and, SNF fees paid by IMPCo are mandated by statute, 42 USC §10222(a)(2)." (13a, emphasis added).

Petitioner's disregard for what the Court of Appeals decided – and did not decide – underscores the lack of foundation for the preemption issue that Petitioner attempts to raise before this Court. The

MPSC properly relied on record evidence to find that federal law required I&M to enter into a contract with the DOE, and that I&M acted reasonably and prudently to continue SNF fee payments, notwithstanding the DOE's breach, because, among other reasons, I&M's nuclear plant license renewal, as well as its priority in the future for SNF disposal, would be at risk. The MPSC's and the Court of Appeal's decisions could not be more clear: federal preemption is not at issue in this case, nor was it relied upon at any stage of the proceedings.

Petitioner moved for reconsideration and for correction of the Court's Opinion, both of which were denied on June 7, 2007 (71a-271a). On July 19, 2007, Petitioner filed an Application for Leave to Appeal with the Michigan Supreme Court. In its filings with the Michigan Supreme Court, Petitioner pressed its erroneous claims concerning federal preemption in this case. The Michigan Supreme Court denied Petitioner's application (69a-70a), and motion for reconsideration (67a-68a).

REASONS FOR DENYING THE PETITION

I. THE MICHIGAN PUBLIC SERVICE COMMISSION AND MICHIGAN COURT OF APPEALS DECISIONS ARE BASED ON MICHIGAN LAW AND DID NOT DECIDE A FEDERAL PREEMPTION QUESTION.

This case does not present an appropriate vehicle to examine the federal preemption question that Petitioner attempts to raise, because this case was decided on the basis of Michigan law as applied to the evidentiary record before the MPSC. Simply put: there was no federal preemption issue (or other issue with federal law) decided below, so there is no sound basis for this Court to review this case. Supreme Court Rule 10.

The MPSC did not find that it was federally preempted from disallowing I&M's PSCR costs. Nor did the MPSC address Petitioner's claim that no federal preemption interfered with the MPSC's jurisdiction.[6] The MPSC simply found the SNF fee costs incurred by I&M were reasonable and prudent based

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[6] In fact, given that Petitioner asserted to the Michigan Supreme Court that the MPSC was not empowered to decide questions of federal preemption, it is difficult to see how federal preemption could have been an issue at all before the MPSC or the Court of Appeals. Likewise, the question could not have been a major issue before the Court of Appeals because the issue was not necessary to the resolution of the appeal. *Kosmyna v. Botsford Community Hosp.*, 238 Mich. App. 694; 607 N.W.2d 134; *appeal granted* 463 Mich. 906; 618 N.W.2d 905; *appeal dismissed* 630 N.W.2d 331 (1999).

on the evidentiary record and under the standard of Michigan law, 1982 PA 304, MCL 460.6j. Hence, Petitioner's claim that there is a question surrounding federal preemption of the MPSC's jurisdiction with regard to SNF fee costs is unfounded, misleading and incorrect.

The Court of Appeals' opinion does not conflict with the litany of federal court decisions cited by Petitioner. The Court of Appeals applied Michigan law, and therefore did not implicate those federal cases. As noted above, the Court of Appeals did not find the MPSC's ratemaking authority constrained by federal law. Instead, the Court of Appeals properly applied the Michigan standard of review under MCL 462.26, which requires the appealing party to show by clear and satisfactory evidence that the MPSC order is unlawful or unreasonable. The Court of Appeals found that Petitioner did not satisfy this standard. The Court of Appeals determined that the MPSC was entitled to rely on the record evidence (despite Petitioner's conflicting evidence), which showed that the payment of the SNF fee costs was mandated by federal law and by I&M's standard contract with the DOE, and that any failure to make the SNF fee payments risked interest charges and possible loss of I&M's operating license for its nuclear plant. The Court concluded that the MPSC's decision was clearly stated and that Petitioner's claims were unsubstantiated. In sum, the Court found that Petitioner failed to show by clear and satisfactory

evidence that the MPSC decision was unlawful or unreasonable.

With respect to Petitioner's contention that federal law does not preempt the MPSC's ratemaking power over SNF fee costs, the Court of Appeals stated that "we need not consider this argument because the PSC did not rely on the doctrine of federal preemption." (13a). The MPSC simply applied well-established Michigan law in light of the evidentiary record. Neither the MPSC nor the Court of Appeals found the MPSC's authority to be constrained by federal law. Petitioner's reasons this for Court to grant the writ are unfounded.

The Court of Appeals' statement that the SNF fee costs are mandated by 42 U.S.C. §10222(a)(2) is supported in the evidentiary record and the federal law cited.[7] This observation about statutory language (notwithstanding Petitioner's theory that the statute is not enforceable) is not the same as finding federal preemption of the MPSC's ratemaking authority. The Court's observation in Footnote 5 (13a) is also *dicta* because it addressed a question not necessary to the decision. *See*, *Murray v. Menzies Real Homes Co.*, 236 Mich. 77; 210 N.W. 217 (1926). Petitioner disregards the Court of Appeals' clear and unequivocal statement

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[7] 42 U.S.C. §10222(a)(2) states: "For electricity generated by a civilian nuclear reactor and sold on or after the date 90 days after January 7, 1983, the fee shall be equal to 1.0 mill per kilowatt-hour."

that it need not consider Petitioner's preemption argument. Moreover, Petitioner utterly disregards the Court of Appeals' determination that the record showed that I&M's payment of SNF fee costs to the DOE was reasonable and prudent because: (1) payment was required under I&M's standard contract with the DOE; (2) I&M's payment, notwithstanding the DOE's delay, was consistent with action taken by other utilities; (3) if I&M refused to pay the fee, it risked losing its nuclear plant operating license; and (4) I&M had supported litigation to compel the DOE to fulfill its duties (12a). In another portion of its opinion, the Court of Appeals further explained that the MPSC had the discretion (under well-established Michigan law) to weigh the evidence presented on the record, and that Petitioner failed to establish any error:

> "IMPCo presented evidence that payment of the SNF fees was mandated by federal law and its standard contract with the DOE, and that failure to make the payments could lead to imposition of interest charges and possible loss of its license to operate its nuclear facility. The PSC was entitled to rely on the evidence presented by IMPCo on this issue, rather than the evidence presented by appellants. *Great Lakes Steel Div. of Nat'l Steel Corp. v. Pub. Service Comm.*, 130 Mich. App. 470, 481; 344 N.W.2d 321 (1983). Moreover, the PSC concluded that, in the absence of evidence that IMPCo acted unreasonably and imprudently with regard to the collection of SNF costs, it had no authority to

> impose additional remedies such as those suggested by appellants. Appellants point to no statute or caselaw that holds to the contrary.
>
> "The basis for the PSC's decision is set out clearly in its order approving IMPCo's PSCR plan, and in particular in its order denying appellants' petition for rehearing. Appellants' argument that the PSC's decision is unlawful and unreasonable because it does not comply with Const 1963, art 6, § 28 and MCL 24.285 is unsubstantiated." (9a-10a).

The MPSC and Court of Appeals' decisions are not based on any federal law question – let alone a significant one. Instead those decisions correctly apply Michigan law in light of a full and clear evidentiary record. There is no merit in Petitioner's contentions that the decisions are contrary to decisions of this Court, the federal Court of Appeals and lower federal courts, since those contentions constructed on Petitioner's misstatements concerning the decisions and the record below. There was no finding of federal preemption, and no further review would be appropriate to decide a purely academic, undeveloped question that would not alter the outcome of this case in any event, since this case was decided based on Michigan law and the evidentiary records. Consequently, because no preemption issue is ripe, Petitioner's contention that the issue presented is of significant national importance likewise affords no basis for this Court to grant the Petition. This is a state-law case that was driven by its facts, so this

case would not be an appropriate vehicle to attempt to address a federal preemption issue with regard to SNF fee payments.

CONCLUSION

The Petition is unfounded, and there is no sound basis to grant it. Therefore, Respondent I&M respectfully requests that the Petition be denied.

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No. 08-246

Supreme Court, U.S.
FILED
SEP 29 2008
OFFICE OF THE CLERK

In the
Supreme Court of the United States

MICHIGAN ENVIRONMENTAL COUNCIL,
Petitioner,

v

MICHIGAN PUBLIC SERVICE COMMISSION AND INDIANA MICHIGAN POWER COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF OF RESPONDENT MICHIGAN PUBLIC SERVICE COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Where the Michigan Court of Appeals affirmed a Michigan Public Service Commission Order allowing Indiana Michigan Power Company to collect spent nuclear fuel disposal costs in its rates as provided by State law, and where that Court found that the Michigan Public Service Commission did not rely on federal preemption in rejecting Petitioner's request to disallow these costs, does this Court have jurisdiction to review the State appellate court decision under 28 USC 1257?

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BRIEF OF RESPONDENT MICHIGAN PUBLIC SERVICE COMMISSION IN OPPOSITION

OPINIONS BELOW

The order of the Michigan Court of Appeals is reported at 275 Mich App 369; 738 NW2d 289 (2007). Pet. App. 1a-16a. The June 7, 2007, order of the Court of Appeals denying Petitioner's motion for correction and reconsideration is not reported. Pet. App. 71a-72a.

The order of the Michigan Supreme Court denying Petitioner's Application for Leave to Appeal is reported at 480 Mich 1032; 743 NW2d 205 (2008). Pet.

App. 69a-70a. The order of the Michigan Supreme Court denying Petitioner's Motion for Reconsideration and Motion for Stay is reported at 481 Mich 881; 748 NW2d 811 (2008). Pet. App. 67a-68a.

The Opinion and Order of the Michigan Public Service Commission (MPSC) in Case No. U-13919 issued on April 28, 2005, can be found at 2005 Mich PSC LEXIS 128 (2005). Pet. App. 25a-43a. The August 1, 2005, MPSC Order denying reopening and rehearing in that case can be found at 2005 Mich PSC LEXIS 256 (2005), Pet. App. 17a-24a. The entire record in the MPSC proceedings can be accessed at: http://efile.mpsc.cis.state.mi.us/efile/viewcase.php?case num=13919.

JURISDICTION

The order of the Michigan Supreme Court denying Petitioner's application for leave to appeal was entered on January 22, 2008. Pet. App. 69a-70a. The order of the Michigan Supreme Court denying Petitioner's motion for reconsideration and motion for stay was denied on May 27, 2008. Pet. App. 67a-68a. The petition for writ of certiorari was filed by Petitioner on August 25, 2008. The jurisdiction of this Court is invoked by Petitioner under 28 USC 1257. Respondent MPSC disputes that this Court has jurisdiction to review the State court order under this statute or any other statute.

STATEMENT

Michigan law provides a comprehensive statutory scheme for the regulation of public utilities

within the State. 1939 PA 3 (Act 3) is a Michigan statute that provides for the regulation and control of public utilities and certain private utilities.[1] Pet. App. 140a-141a. The MPSC has broad and exclusive power to regulate and approve rates for all public utilities in the State of Michigan. MCL 460.6 grants this power as follows:

> (1) The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state except a municipally owned utility, the owner of a renewable resource power production facility as provided in section 6d, and except as otherwise restricted by law. The public service commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities. The public service commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of public utilities, including electric light and power companies, whether private, corporate, or cooperative; water, telegraph, oil, gas, and pipeline companies; motor carriers; private wastewater treatment facilities; and all public transportation and communication agencies other than railroads and railroad companies.
>
> (2) A private, investor-owned wastewater utility may apply to the commission for rate regulation. If an application is filed under this

[1] Michigan Compiled Laws (MCL) 460.1 *et seq.*

> subsection, the commission is vested with the specific grant of jurisdictional authority to regulate the rates, fares, fees, and charges of private, investor-owned wastewater utilities. As used in this subsection, "private, investor-owned wastewater utilities" means a utility that delivers wastewater treatment services through a sewage system and the physical assets of which are wholly owned by an individual or group of individual shareholders.

Section 6a of Act 3 provides for procedures for the MPSC to utilize when approving rates for public utilities and requires that a contested case be conducted whenever an order will result in an increase in the cost of services to a customer.[2] Pet. App. 141a-144a.

A statute amending Act 3,[3] permits an electric utility to recover its power supply costs through either base rates or through a power supply cost recovery (PSCR) clause.[4] Pet. App. 144a-174a.

Act 304 defines a PSCR clause as follows:

> (a) "Power supply cost recovery clause" means a clause in the electric rates or rate schedule of

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[2] MCL 460.6a.

[3] 1982 PA 304; MCL 460.6j *et seq.* (Act 304).

[4] The portion of Petitioner's Appendix containing MCL 460.6; MCL 460.6a, and MCL 460.6j *et seq.* include the catch line heading of each section of the statutes. Michigan law provides that these headings "shall in no way be deemed to be part of the section or statute, or to be used to construe the section more broadly or narrowly than the text of the section would indicate, but shall be deemed to be inserted for purposes of convenience to persons using publications of the statutes." MCL 8.4b.

> a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices.[5]

If the MPSC has approved a PSCR clause for an electric utility, that utility collects its power supply costs on a yearly basis. Prior to the beginning of the year, the utility will present its plan to acquire power to serve its customers, typically by its own generation or through power purchase contracts. The plan will indicate the utility's expected sales and propose a per unit cost of electricity that is known as the PSCR factor.[6] A contested administrative proceeding, known as a PSCR plan case, is conducted, and the MPSC then establishes PSCR factors.[7]

After the conclusion of the year, the PSCR costs are reconciled with the actual collection of costs, and a determination is made as to whether the acquisition of power was done in a reasonable and prudent manner. If the utility has overrecovered its costs, it refunds the overcollection. If it underrecovers, it may surcharge its customers.[8]

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[5] MCL 460.6j(1)(a).

[6] MCL 460.6j(3).

[7] MCL 460.6j(5).

[8] MCL 460.6j(12)-(16).

Within this comprehensive State statutory ratemaking scheme, Indiana Michigan Power Company (I&M) filed for MPSC approval of a PSCR plan and for authorization of monthly PSCR factors for the calendar year 2004 in MPSC Case No. U-13919. The Petitioner[9] intervened in U-13919 and argued that the portion of I&M's PSCR costs, which included spent nuclear fuel (SNF) disposal costs, should be disallowed. The MPSC, however, held that no showing had been made that it was unreasonable or imprudent for I&M to incur those costs, and that those costs could be recovered from ratepayers in the PSCR factors. Pet. App. 37a - 41a.

Petitioner argued on appeal in State court that the Commission order was unlawful because it did not adopt Petitioner's recommended disallowance of these SNF disposal costs. The Michigan Court of Appeals affirmed, holding that the MPSC had properly concluded that I&M had acted reasonably and prudently in including SNF disposal fees in its PSCR factors. The Court noted that I&M's witness testified

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[9] Petitioner alleges that it is "a statewide environmental and consumer protection organization comprising over 70 public interest organizations representing some 200,000 Michigan utility ratepayers." Pet., 11, footnote 3. MEC's Petition to Intervene in MPSC Case No. U-13919, reveals that it asserted at that time that it was a "statewide nonprofit public interest and environmental organization consisting of 64 public health and environmental organizations, having over 200,000 members," and that "[v]arious of the individual member organizations of MEC, and their citizen members, purchase their electricity in whole or part from Indiana Michigan Power Company." It did not allege that the organization had 200,000 Michigan utility ratepayers or that the organization comprised of over 70 organizations representing those ratepayers. The Petition to Intervene can be accessed at: http://efile.mpsc.cis.state.mi.us/efile/docs/13919/0004.pdf.

that: 1) the payment of these fees was required under I&M's contract for SNF disposal with the Department of Energy (DOE); 2) I&M's decision to pay these fees, notwithstanding the federal government's delay in completing a disposal site, was consistent with action taken by other utilities; 3) if I&M refused to pay the fees it risked losing its license to operate its nuclear power plant; and 4) I&M had supported litigation to compel the federal government to fulfill its duties under the National Waste Policy Act.[10] Pet. App. 12a-13a.

Significantly, the Court observed that while Petitioner had argued that federal law did not preempt the MPSC's ratemaking powers over SNF disposal fees, it "*need not consider this argument because the PSC did not rely on the doctrine of federal preemption.*" Pet. App. 13a. (Emphasis added.) The Court held that the MPSC acted within its authority in declining to adopt the Petitioner's recommended disallowance and other remedies. Pet. App. 13a.

REASONS FOR DENYING THE WRIT

Petitioner seeks a writ for this Court to review a Michigan Court of Appeals' decision affirming a MPSC ratemaking order finding certain utility costs to be incurred reasonably and prudently. The Michigan court correctly held that the MPSC did not base its decision on federal preemption. Petitioner's collateral attack on federal appellate decisions addressing

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[10] *In re Application of Indiana Michigan Power Company*, 275 Mich App 369, 378; 738 NW2d 289, lv den, 480 Mich 1032; 743 NW2d 205 (2008), motion for reconsideration denied, 481 Mich 881; 748 NW2d 811 (2008).

contracts for spent nuclear fuel disposal does not establish a conflict between the Michigan Court of Appeals' decision and the Constitution or laws of the United States. Petitioner has failed to demonstrate that this Court has jurisdiction to issue a writ of certiorari to review this State ratemaking decision.

I. WHERE THE STATE COURT OF APPEALS CORRECTLY FOUND THAT THE MPSC HAD NOT RELIED ON FEDERAL PREEMPTION IN REACHING ITS DECISION, PETITIONER HAS FAILED TO ESTABLISH A BASIS FOR THIS COURT'S JURISDICTION PURSUANT TO 28 USC 1257.

Petitioner generally claims that the MPSC is not "preempted" from disallowing spent nuclear fuel disposal costs in a State power supply cost recovery proceeding. Petitioner's argument incorrectly assumes that the MPSC found that it was preempted by federal law from disallowing I&M's SNF disposal fees. The MPSC never made such a finding, as the Court of Appeals properly found.[11] Pet. App. 13a. Instead, the MPSC found, based on testimony, that I&M had acted reasonably and prudently in incurring these costs. Pet. App. 73a-97a. No preemption issue exists in this case.

Furthermore, Petitioner's recitation of other Michigan Court of Appeals' decisions affirming similar findings for other utilities is irrelevant to the issue of

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[11] *In re Application of Indiana Michigan Power Company*, 275 Mich App 378, footnote 5.

whether this Court has jurisdiction under 28 USC 1257.[12]

Petitioner seeks to advance a federal preemption argument regarding the Court of Appeals' decision affirming the MPSC's ratemaking decision. But a review that court's decision plainly establishes that the preemption issue was not considered - either by the Michigan Court or the MPSC - when determining whether I&M's payment of SNF fees was reasonable and prudent and whether such costs were lawfully included in its rates:

> The PSC has the discretion to consider a variety of factors when setting just and reasonable rates,[4] and the authority granted to the PSC is set out in MCL 460.6a and MCL 406.6j. The PSC acted in accordance with this authority and properly concluded that, in the absence of a finding of unreasonable or imprudent conduct on the part of a utility, it lacked the authority to impose the remedies suggested by appellants, including placing the burden of paying SNF fees on IMPCo's stockholders rather than on IMPCo's ratepayers. Appellants have not shown by clear and satisfactory evidence that the PSC's decision is unlawful or unreasonable. MCL 462.26(8).[5]

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[4] See *Detroit v Public Service Comm.*, 308 Mich. 706, 718; 14 N.W.2d 784 (1944).

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[12] Rather than showing a need for this Court to resolve conflicting opinions by granting certiorari, these decisions show that the Commission's findings regarding the reasonableness and prudence of payment of these fees has been consistently applied.

> [5] Appellants argue that federal law does not preempt the PSC's ratemaking powers over SNF fees. We need not consider this argument because the PSC did not rely on the doctrine of federal preemption. Moreover, a state utility commission must allow, as a reasonable operating expense, a cost incurred pursuant to a federal statute, see *ABATE v. Pub Service Comm.*, 192 Mich. App. 19, 22-27; 480 N.W.2d 585 (1991) (holding that states must give effect to rates approved by the Federal Energy Regulatory Commission), and SNF fees paid by IMPCo are mandated by statute, 42 U.S.C. 10222(a).
>
> Pet. App. 13a.

Thus, both the MPSC's decision and that of the Michigan Court of Appeals were based upon State law. Because of that no federal question is presented for review.

II. PETITIONER'S COLLATERAL ATTACK ON FEDERAL APPEALS COURT DECISIONS RELATING TO SPENT NUCLEAR FUEL DOES NOT ESTABLISH 28 USC 1257 JURISDICTION TO REVIEW A STATE COURT OPINION INVOLVING STATE RATEMAKING AUTHORITY.

Petitioner has failed to show that the Court of Appeals' decision conflicts with the Constitution or laws of the United States. Petitioner has nonetheless included a significant discussion of two federal decisions, *I&M, et al v DOE*[13] and *Northern States Power Co, et al v DOE*[14] in what amounts to a collateral attack on those decisions. Although in each

[13] *I&M, et al v DOE*, 319 US App DC 209; 88 F3d 1272 (1996).

[14] *Northern States Power Co, et al v DOE*, 327 US App DC 20; 128 F3d 754 (1997).

of these decisions, the U.S. Court of Appeals for the District of Columbia Circuit found that the DOE had a responsibility to accept SNF for disposal as of January 31, 1998, it did not issue a writ of mandamus ordering DOE to dispose of the SNF. Rather, the D.C. Circuit indicated that aggrieved utilities with a standard contract for disposal of SNF with DOE could pursue their contractual remedies.[15]

In *I&M, et al v DOE* (in which Respondent I&M was the lead utility company), the D.C. Circuit issued its decision, prior to the January 31, 1998 date specified in the Nuclear Waste Policy Act (NWPA),[16] Pet. App. 73a-97a., for DOE to start disposing of the SNF. The D.C. Circuit found that the statute created "an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998."[17] In *Northern States Power Co, et al v DOE*, (issued on November 14, 1997 before the January 31, 1998 statutory deadline), the D.C. Circuit noted that, after its decision in the *I&M, et al v DOE* case, DOE informed various utilities and State commissions that it would not accept the SNF for disposal by the 1998 deadline. The D.C. Circuit held that it would not grant a writ of mandamus sought by the Petitioners requiring DOE to comply with the previous holding because the standard contract between DOE and the utilities "provides a potentially

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[15] It is also noteworthy that while Petitioner here attempts to argue that the MPSC has failed in its alleged duty to disallow the fees paid by I&M to DOE, the Petitioner fails to note that the MPSC was the lead State in the litigation of both of these cases on behalf of a group of numerous State commissions.

[16] Nuclear Waste Policy Act of 1982, as amended, 42 USC 10101 *et seq.*

[17] *I&M, et al v DOE*, 319 US App DC 209; 88 F3d 1272, 1277 (1996).

adequate remedy if DOE fails to fulfill its obligations by the deadline."[18]

Neither of these decisions are relevant to a consideration of whether this Court should grant this Petition because they concern the rights and remedies for parties to the contracts between utility companies and DOE due to DOE's breach of its duty to dispose of SNF. While Petitioners are dissatisfied with these decisions, the fact remains that the D.C. Circuit declined to order DOE to begin disposing of the SNF as a consequence of DOE's breach of its obligation to do so.

These federal decisions do not involve State ratemaking authority, or State decisions regarding reasonable power supply costs for a State utility commission to include in rates. In MPSC Case No. U-13919, the subject of the Michigan Court of Appeals' decision for which the writ is sought, the MPSC approved including the SNF disposal fees that I&M paid to DOE in I&M's PSCR rates. That decision did not involve the contractual rights of either I&M or DOE, or the remedies available for breach of contractual rights between those two entities. The Commission simply found that payment of these fees to DOE was both reasonable and prudent under Michigan's comprehensive statutory scheme regulating public utilities.

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[18] *Northern States Power Co, et al v DOE*, 327 US App DC 20; 128 F3d 754, 755-756 (1997). The D.C. Circuit did issue a writ of mandamus prohibiting DOE from relying on the unavoidable delays provision of the standard contract. *Northern States Power Co* at 756.

CONCLUSION

The petition for writ of certiorari should be denied.

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Dated: September 26, 2008

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(5)

Supreme Court, U.S.
FILED
OCT 17 2008
OFFICE OF THE CLERK

No. 08-246

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On Petition for Writ of Certiorari to the Michigan Court of Appeals

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B. The MPSC's short-circuited process below barred the presentation of qualified evidence upon which a determination in favor of reasonableness and prudence could be made. 5

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II. The preemption issue in this case is "ripe for review" by this Court. 11

III. Petitioner's appeal comports with previous federal court decisions, and does not constitute a collateral attack upon such decisions. 12

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APPENDIX

Appendix 1: Michigan Supreme Court's September 19, 2008 order refusing review of Petitioner's spent nuclear fuel (SNF) cost and rate issues in *Michigan Environmental Council and Public Interest Research Group in Michigan v Michigan Public Service Commission, Detroit Edison Company, et al*; Michigan Supreme Court Docket 134674; Michigan Court of Appeals Docket 264131; MPSC Case U-13808, consolidated with other cases. 1a

Appendix 2: Michigan Supreme Court's September 19, 2008 order denying application for leave to appeal in *Michigan Environmental Council and Public Interest Research Group in Michigan v Michigan Public Service Commission, Consumers Energy Company,* Michigan Supreme Court Docket 136433, Michigan Court of Appeals Docket 264860, MPSC Case U-13917. ..... 8a

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ARGUMENT IN REPLY

I. This case involves a federal question as to whether the ratemaking powers of the state MPSC are preempted by federal law, and does not involve a fact-bound case under state law as argued by Respondents.

Respondents erroneously assert that this case does not involve a federal preemption question, but rather, state law issues concerning whether the MPSC and lower Court lawfully determined, based upon the evidentiary record, that Respondent Indiana Michigan Power Company ("IMP") was reasonable and prudent in continuing to pay fees under its breached Standard Contract, justifying recognition of the contract fees in retail rates regulated under Michigan law (Act 304, MCL 460.6a and 460.6j *et seq.*, 140a-174a).

Respondent's arguments are belied by several factors: (1) Respondent IMP (and Michigan utilities) have vigorously argued in this and other contemporaneous cases that federal preemption barred MPSC authority to adopt ratemaking remedies to protect the contract fees included in retail rates; (2) the findings of the MPSC and lower Court below that demonstrate that federal preemption was a prominent inseparable part of the reasoning that led to the result below; and (3) by the faulty process utilized below that evaded any serious effort to require acceptable evidence upon which a finding in favor of reasonableness and prudence could be based.

A. The MPSC and lower Court erroneously determined that MPSC retail ratemaking authority is preempted by federal law.

The MPSC and lower Court erroneously determined that MPSC retail ratemaking authority to adopt remedies to protect ratepayers with respect to the contract fee costs is preempted by federal law. Despite Respondent IMP's counsel's inconsistent post-hoc arguments to the contrary, IMP's counsel vigorously argued in hearings and briefing before the MPSC that IMP's continuing payment of fees under its breached contract was "mandated" by federal statute and the Standard Contract, and that the MPSC was preempted from reaching any other conclusion but that IMP was reasonable and prudent in continuing to pay the fees, without conditions or remedies to protect the fee payments. The MPSC's August 1, 2005 order (17a-23a) recited IMP's arguments (20a-21a):

> I&M also points out that it is legally obligated to pay the SNF fees, in order to retain its nuclear power plant license and its ability to access the planned federal repository. I&M further points out that escrowing of the funds is disallowed under the standard contract, and that one federal court has ruled that utilities may not escrow the funds, but must seek relief under the standard contract.

These "findings" are entirely based upon the scant and vague testimony, comprising legal conclusions, of IMP's non-lawyer lay witness (quoted in IMP's brief, pp 8-10). The MPSC Order did not cite any specific legal authority except to refer to this IMP witness.

Absent from IMP's presentation is any legal authority or case decision that supports a theory that retaliatory action could result merely because a contracting party may seek legal or contract action to protect ongoing fee payments under a contract in long-term default, or that would bar a utility from pursuing remedies under Chapter XI of the Standard Contract (129a) to pay the fees into an external interest bearing escrow as part of its "legal or contract remedies". The lower court then blithely accepted these same "findings" stating (9a, 12a):

> IMPCo presented evidence that payment of the SNF fees was mandated by federal law and its standard contract with the DOE, and that failure to make the payments could lead to imposition of interest charges and possible loss of its license to operate its nuclear facility. The PSC was entitled to rely on the evidence presented by IMPCo on this issue, rather than the evidence presented by appellants. (9a)
>
> . . .
>
> . . . The payment of SNF fees by a utility is mandated by 42 U.S.C. 10222.
>
> A witness for IMPCo testified that IMPCo's actions with respect to collection of SNF costs from ratepayers and payment of SNF fees to the DOE were reasonable and prudent. The witness noted that (1) payment was required under IMPCo's standard contract with the DOE; . . . (3) if IMPCo refused to pay the fees it risked losing its license to operate its nuclear power plant; . . . (12a)

These "findings of law" were based merely upon the opinion of a single IMP lay witness! The Court delegated its duties to undertake de novo review of statutory and constitutional issues to IMP's non-qualified witness!

A primary holding of the Court below also stated (13a):

> Appellants argue that federal law does not preempt the PSC's ratemaking powers over SNF fees. We need not consider this argument because the PSC did not rely on the doctrine of federal preemption. Moreover, a state utility commission must allow, as a reasonable operating expense, a cost incurred pursuant to a federal statute, see *ABATE v. Pub. Service Comm.*, 192 Mich. App. 19, 22-27, 480 N.W.2d 585 (1991) (holding that states must give effect to rates approved by the Federal Energy Regulatory Commission), and SNF fees paid by IMPCo are mandated by statute, 42 U.S.C. 10222(a).

Respondents do not explain how the Court's statement in the first two sentences above makes any sense since binding Michigan precedent holds that the MPSC may not decide constitutional issues, and that a reviewing Court has the duty to decide statutory and constitutional issues on a de novo basis. *Universal Am-Can v. MPSC*, 494 N.W.2d 787 (1992); *City of Taylor v. The Detroit Edison Co.*, 715 N.W.2d 28 (2006). Respondents then merely discount as "dicta" the rest of the lower Court's holdings applying preemption, based upon a misanalysis of the federal

statute and a misapplication of the "federal filed rate doctrine".

The inescapable conclusion is that the IMP's lay witness' opinion concerning the law became the basis for the MPSC and lower Court findings. This was coupled with IMP's vigorous arguments that IMP was reasonable and prudent because IMP's indefinite continuing payment of contract fees, without protective remedies, was mandated by the federal statute and contract, despite the long-term contract breach.[1] The preemption issue in fact became so predominant below as to control the result, and to make impossible any separation of the issue out of the case (as attempted by Respondents).

B. The MPSC's short-circuited process below barred the presentation of qualified evidence upon which a determination in favor of reasonableness and prudence could be made.

Respondents' premise that this case merely involves a pedestrian evidentiary dispute concerning IMP's reasonableness and prudence, and a state law issue, ignores the defunct process undertaken before the MPSC – a process that evaded any serious effort to obtain or review factual information bearing upon reasonableness and prudence.

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[1] Petitioner did not assert below that IMP should simply cease paying the fees. Rather, Petitioner asserted that, in view of the contract breach, IMP should not simply pay the fees without protective conditions or actions, and in absence thereof, the MPSC is legally empowered to protect ratepayers.

Petitioner in the MPSC case propounded a very comprehensive discovery request to IMP to seek all possible information and documents that could be relevant to determining IMP's reasonableness and prudence. Yet IMP objected to and refused to answer the discovery, and the Administrative Law Judge ("ALJ") rejected Petitioner's motion to compel discovery, and refused to strike IMP's vague lay testimony concerning legal conclusions.

If in fact the result in this case rested upon findings that IMP was "reasonable and prudent", then why was all discovery bearing upon this issue denied in the MPSC process below? Why do Respondents claim that the MPSC and lower Court based their result solely upon a lay witness' vague and unexplained legal opinion concerning the application and impact of federal law?

Contrary to Respondent's claims, the result below was not based upon even a feigned effort or interest in obtaining factual information bearing upon IMP's reasonableness and prudence, but rather, was preordained upon an erroneous perception and presumption that federal law preempted MPSC authority to undertake meaningful ratemaking remedies to protect ratepayers with respect to the ongoing fee payments under the breached contract.

C. Respondent's claims are also belied by IMP's and other utility's vigorous arguments of preemption in related MPSC cases, including a Detroit Edison case which is en route to this Court.

Respondents' claims also ignore related MPSC and lower court decisions in which nuclear utilities serving Michigan ratepayers, including IMP, have vigorously argued that the application of any MPSC ratemaking remedies to protect the SNF fee payments are preempted by federal law.

A key MPSC case is now en route to this Court. Specifically, *In re The Detroit Edison Company*, U-13808 ("DECo"), the utility filed a consolidated general rate and power supply cost recovery (PSCR) case, pursuant to all of the statutes applicable to ratemaking (including Act 304). This case was filed on June 20, 2003, several months before IMP filed the instant case before the MPSC. In *DECo*, the utility included in its rate request the cost of its SNF fees under its Standard Contract with DOE. Petitioner MEC presented extensive expert evidence in opposition to inclusion of the contract fees in rates, without protective conditions, asserting that DECo was unreasonable and imprudent, and had shown no basis for a finding of reasonableness and prudence. In response, the utility argued extensively that the MPSC must allow the contract fees in rates because MPSC ratemaking authority was preempted by federal law. The ALJ in *DECo* (302a-308a) summarized DECo's

arguments and affirmatively found that preemption applied (303a-304a):

> ...Detroit Edison continues that federal preemption requires the Commission to allow Detroit Edison the ability to recover all SNF fees and costs.
>
> * * *
>
> ...the ALJ believes that preemption prevents state intervention into the federally regulated nuclear arena.

Petitioner MEC and DECo vigorously litigated the preemption issue before the MPSC in initial briefing, and in briefs of exception to the ALJ's ruling, and replies to exceptions. The MPSC then issued its final order in U-13808, dated November 23, 2004 (relevant portions, 291a-301a). The MPSC order's 5-sentence ruling on SNF issues (297a) adopted the ALJ's preemption ruling:

> . . . The Commission finds that the ALJ cannot be faulted for his recommendation.

The MPSC's subsequent June 30, 2005 Order denying rehearing (281a-290a) in *DECo* reiterated the MPSC's adoption of the ALJ's preemption ruling. This MPSC order noted Petitioner MEC's insistence "...that the Commission is not preempted by federal law from disallowing recovery of these fees" (285a), and DECo's argument "that because federal law requires it to pay these SNF charges and fees, the Commission is preempted from preventing Detroit Edison from

recovering these costs in its rate. . . . (286a)". The MPSC rehearing order concluded unequivocally (288a):

> As the Commission intended to convey in its November 23, 2004 order, it agrees with the discussion and conclusions of the Proposal for Decision at pages 110-113. The Commission is not persuaded that it should reach a different conclusion at this time.

Petitioner MEC appealed the *DECo* case to the Michigan Court of Appeals,[2] which issued its decision on July 3, 2007, in *In re Application of Detroit Edison*, 740 N.W.2d 685 (2007). The *DECo* court (234a-280a) ignored the evidentiary record and the MPSC's preemption ruling, and the extensive briefing on the preemption issue, and rejected review on the merits (at 267a) by means of a *sua sponte* application of collateral estoppel, based upon its decision in this case *In re Application of Indiana Michigan Power Co.*, 275 Mich. App. 369, 738 N.W.2d 289 (2007).

The lower court decisions in this case and the *DECo* case were authored by the same judge. Yet the Court ignored the obvious immutable inconsistency in stating in this case (IM Power) (13a) that the Court "need not consider this argument because the PSC did not rely on the doctrine of federal preemption" and the opposite situation in the *DECo* case, wherein the MPSC adopted preemption as a basis for its decision! The *DECo* decision also ignored Michigan's binding

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[2] This appeal was filed and argued before that Court earlier than this case; nevertheless, the lower court issued its decision in DECo after the decision in this case.

published precedent that collateral estoppel does not apply to MPSC rate cases, *Consumers Energy v. MPSC*, 707 N.W.2d 633 (2005). The Court's application of collateral estoppel *sua sponte*, despite this binding precedent, violated the requirements and procedures set forth in the Michigan Court Rules, MCR Rule 7.215 (192a-195a).

Petitioner MEC appealed the lower Court's decision in *DECo*, and another case involving Consumers Energy Company ("CECo"),[3] to the Michigan Supreme Court. On September 19, 2008, the Michigan Supreme Court issued its orders denying review of Petitioner's SNF fee cost and rate issues in both cases.[4]

Petitioner MEC will promptly file a Petition for Certiorari to seek review by this Court of the *DECo* case. Petitioner requests the Court to review this case (*IM Power*) and the *DECo* case, on a consolidated basis. Such review will further refute Respondents' arguments. Respondents' situational claims are belied by the vigorous utility arguments in support of preemption made both in this case and the *DECo* case.

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[3] The lower Court's *CECo* decision is included in Petitioner's appendix at 309a-347a, which applied the lower Court's decision in this case (*IM Power*) and in *DECo* as controlling its CECo decision (see 345a-347a).

[4] The Michigan Supreme Court's order denying review of Petitioner's appeals in the *DECo* and *CECo* cases are attached in the supplemental appendix attached to this reply brief.

In yet another MPSC case, U-13771, commenced by a comprehensive generic complaint (374a-459a) filed by Petitioner MEC (and others), five Respondent utilities, including IMP, vigorously argued that the MEC had no jurisdiction, due to federal preemption, to undertake remedial ratemaking remedies to protect ratepayers concerning the cost of SNF contract fees. The ALJ's ruling in that case (460a-571a) included extensive legal findings on the preemption issue (512a-533a).

Respondents' arguments seeking to deflect the Court from the prominence of the preemption issue in this case is duplicitous given the vigorous arguments made by respondent utilities in support of preemption in these related MPSC and lower Court cases, and by IMP in this case.

II. The preemption issue in this case is "ripe for review" by this Court.

Respondent IMP argues (pp 15-17) that Petitioner's preemption issues is not "ripe for review". The previous discussion demonstrates that this claim is unmeritorious. At minimum, the decisions and process below were so heavily infected by erroneous conclusions concerning preemption that respondents' claims of a separate state law or evidentiary basis for the result is not credible.

Second, as noted, this case and the *DECo* case are inter-related with respect to the preemption issue. The Court decisions below are inconsistent and circular. If, as Respondents claim, the Court in *IM Power* did not rule upon preemption on the basis the

MPSC did not rule on the issue of preemption, how could this govern over *DECo* pursuant to collateral estoppel wherein the MPSC adopted preemption!

Third, Respondent IMP states (p 6) that the preemption issue is not ripe for review because Petitioner has not appealed the *DECo* case. However, this case (*IM Power*) and the *DECo* case became separated time-wise by the lower Court's "slow-down" of the *DECo* case, and "speed-up" of this case (the *IM Power* case). Contrary to Respondent's premise, Petitioner MEC will promptly file a certiorari petition to seek this Court's review of the *DECo* decision, and requests review of this case and *DECo* on a joint basis.

III. Petitioner's appeal comports with previous federal court decisions, and does not constitute a collateral attack upon such decisions.

Respondent MPSC (pp 10-12) erroneously claims that Petitioner's appeal constitutes a collateral attack on previous federal Court of Appeals decisions such as *Northern States Power v. DOE*, 128 F3d 754 (1997). ("*Northern States*").

Respondent's argument ignores the clarity of the Court of Appeals declaratory holding in *Indiana Michigan Power Company v. DOE*, 88 F3d 1272 (1996) of the *reciprocal obligation* of utility payment of fees under the Standard Contract in exchange for DOE's commencement of SNF disposal by January 31, 1998, and the *quid pro quo* of this contractual bargain.

Respondents' argument ignores the Court's reaffirmation of this unconditional reciprocal obligation in *Northern States*. The Court's 1997 *Northern States* ruling (when faced with anticipatory contract breach) found that utility damage suits might be a "potentially adequate remedy". However, *Northern States* did not hold that any other legal or contractual remedy that might be pursued by a utility to protect its contractual bargain or to protect the fees was barred.

The *Northern States* case also certainly did not deal with the issue faced here, and did not arise in the same context – namely, whether a state ratemaking agency having jurisdiction over a retail nuclear utility is preempted from reviewing and imposing ratemaking remedies upon a utility to protect ratepayers with respect to the economic or environmental costs of nuclear energy. Respondent MPSC's argument ignores this Court's holding in *Pacific Gas & Electric v. Energy Resources Commission*, 461 U.S. 190 (1983) that this state agency power was not preempted by federal law – a holding that the MPSC and lower Court ignored in this case.

Contrary to Respondents' claims, Petitioner's appeal does not constitute a collateral attack upon any federal Court decision. The opposite is true. Petitioner seeks to prevent the MPSC and lower Courts from eviscerating this Court's holding in *Pacific Gas*, and the federal court holdings in *Indiana Michigan* and *Northern States* concerning the reciprocal obligations under the NWPA and Standard Contract. Petitioner asserts, consistent with the NWPA and Standard Contract, that utilities should

invoke all possible remedies to protect the fee payments and to seek performance under the contract – yes – even a contract with the federal government, and, failing to do so, the state ratemaking agency is not preempted by federal law from exercising its ratemaking powers to protect ratepayers.

CONCLUSION

This Court should grant the petition and review this case.

Respectfully submitted,

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Counsel for Petitioner

Date: October 17, 2008

APPENDIX

APPENDIX 1

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

Docket Nos. 134667-69 & (45);
134671; 134673-74; 134676-77

[Filed September 19, 2008]

SC: 134667
COA: 259845
MPSC: U-13808

ATTORNEY GENERAL, Appellant, v. MICHIGAN PUBLIC SERVICE COMMISSION, DETROIT EDISON COMPANY, and CONSTELLATION NEWENERGY, INC., Appellees.	)

SC: 134668
COA: 264099
MPSC: U-13808

DETROIT EDISON COMPANY; Appellee,	)

v.

MICHIGAN PUBLIC SERVICE COMMISSION, ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY, MICHIGAN ENVIRONMENTAL COUNCIL, PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN, and CONSTELLATION NEWENERGY, INC.,
Appellees,

and

ATTORNEY GENERAL,
Appellant.

SC: 134669
COA: 264191
MPSC: U-13808

ATTORNEY GENERAL,
Appellant,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, DETROIT EDISON COMPANY, ENERGY MICHIGAN, INC., CONSTELLATION NEWENERGY, INC., and ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,
Appellees.

SC: 134671
COA: 264099
MPSC: U-13808

DETROIT EDISON COMPANY,
Appellee,

v.

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY, MICHIGAN ENVIRONMENTAL COUNCIL, PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN, CONSTELLATION NEWENERGY, INC., and ATTORNEY GENERAL,
Appellees,

and

MICHIGAN PUBLIC SERVICE COMMISSION,
Appellant.

SC: 134673
COA: 264099
MPSC: U-13808

DETROIT EDISON COMPANY,
Appellee,

v.

MICHIGAN PUBLIC SERVICE

COMMISSION, ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY, CONSTELLATION NEWENERGY, INC., and ATTORNEY GENERAL,
Appellees,

and

MICHIGAN ENVIRONMENTAL COUNCIL, and PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN,
Appellants.

SC: 134674
COA: 264131
MPSC: U-13808

MICHIGAN ENVIRONMENTAL COUNCIL and PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN,
Appellants,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, DETROIT EDISON COMPANY, and CONSTELLATION NEWENERGY, INC.,
Appellees.

SC: 134676
COA: 264099
MPSC: U-13808

DETROIT EDISON COMPANY,
Appellee,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, MICHIGAN ENVIRONMENTAL COUNCIL, PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN, CONSTELLATION NEWENERGY, INC., and ATTORNEY GENERAL,
Appellees,

and

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,
Appellant.

SC: 134677
COA: 264156
MPSC: U-13808

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,
Appellant,

v.

MICHIGAN PUBLIC SERVICE)
COMMISSION, DETROIT EDISON)
COMPANY, ENERGY MICHIGAN, INC.,)
CONSTELLATION NEWENERGY, INC.,)
and ATTORNEY GENERAL,)
Appellees.)
)

ORDER

On order of the Court, the motion of Detroit Edison Company to exceed the page limit is GRANTED. The applications for leave to appeal the July 3, 2007 judgment of the Court of Appeals are considered, and they are GRANTED, limited to: (1) whether "transmission costs" may be included in the power supply cost recovery factor, MCL 460.6j(1)(a) and (b); and (2) whether the Court of Appeals erred in concluding that the Michigan Public Service Commission's decision to prohibit recovery of the control premium that DTE Energy paid to acquire MCN Energy by including the premium in Detroit Edison's rates was not supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90 (July 23, 2008) (Docket Nos. 134493, 134500), slip op at 11-12.

We further ORDER that these cases be argued and submitted to the Court together with the case of *Attorney General v Michigan Public Service Commission* (Docket No. 136431), at such future session of the Court as these cases are ready for submission.

Seal of the Michigan
Supreme Court Lansing

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 19, 2008 /s/ Corbin R. Davis
Clerk

APPENDIX 2

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

Docket No. 136433

[Filed September 19, 2008]

SC: 136433
COA: 264860
MPSC: U-013917

MICHIGAN ENVIRONMENTAL COUNCIL and PUBLIC INTEREST RESEARCH GROUP, Appellants,	)
v.	)
MICHIGAN PUBLIC SERVICE COMMISSION and CONSUMERS ENERGY COMPANY, Appellees.	)

On order of the Court, the application for leave to appeal the April 1, 2008 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Seal of the Michigan
Supreme Court Lansing

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 19, 2008 /s/ Corbin R. Davis
Clerk